Cornell Law Review

Volume 77
Issue 4 *May 1992*

Article 6

For One Litigant's Sole Relief: Unforeseeable Preclusion and the Second Restatement

Robert Ziff

FOR ONE LITIGANT'S SOLE RELIEF: UNFORESEEABLE PRECLUSION AND THE *SECOND RESTATEMENT*

INTRODUCTION

Too often in our litigious society, individuals bring law suits that are similar to, but not the same as, previously litigated disputes. Rather than hear these suits, courts occasionally preclude them by developing novel exceptions to the established limitations of res judicata[1] law. The influential *Restatement (Second) of Judgments*[2] (the "*Second Restatement*") consistently implies that there are circumstances when this kind of innovative "exception to a limitation" is proper, even in the context of some of the most firmly established limitations in the law of preclusion.[3] This view allows a court to invoke res judicata whenever it has good reason to conclude that a party's action in a prior suit forfeits his right to a second day in court.

Preclusion, however, is only justified when it is foreseeable. This principle has been recognized since Judge Learned Hand's discussion of foreseeablity in *The Evergreens v. Nunan*,[4] in which he argned:

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1 This Note follows the modern trend in res judicata terminology set forth by the Supreme Court in Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984):

> The preclusive effects of former adjudication . . . are referred to collectively by most commentators as the doctrine of "res judicata." [Citations omitted]. Res judicata is often analyzed further to consist of two preclusion concepts: "issue preclusion" and "claim preclusion." Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. *See* Restatement [(Second) of Judgments] § 27. This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar. *See id.*, Introductory Note before § 24.

See also 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4402 & n.2 (1981) [hereinafter WRIGHT, MILLER & COOPER].

2 RESTATEMENT (SECOND) OF JUDGMENTS (1980).

3 *See infra* Part III.

4 141 F.2d 927 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944). The case involved a tax dispute in which the taxpayer sought to require that facts tangentially found in a prior proceeding be used to calculate his present tax liability. While the court declined to announce a general policy against using issue preclusion when its invocation would not be foreseeable, it announced a doctrine which would only apply preclusion to matters that were "ultimate facts" in the prior proceeding, not to mere "mediate data." Because

> What jural relevance facts may acquire in the future it is often impossible even remotely to anticipate. Were the law to be recast, it would therefore be a pertinent inquiry whether the conclusiveness . . . of facts decided in the first, might not properly be limited to future controversies which could be thought reasonably in prospect when the first suit was tried. That is of course not the law as it stands . . . .[5]

Evergreens established the principle that parties may relitigate tangential issues if they could not foresee the issues' subsequent importance at the time of the first suit. Judge Hand's suggestion was accepted by the Supreme Court[6] and by the *Second Restatement*, which added that the suggestion might apply, for example, when the governing substantive law unforeseeably changes.[7]

While the *Second Restatement* seems to treat unforeseeable preclusion differently, depending on whether it results from a change in the substantive law or from an innovation in the law of res judicata, the principle of *Evergreens* should apply to both cases. Res judicata is a harsh doctrine, which deprives the precluded party of even an opportunity to be heard on the merits of the case. Consequently, preclusion is only justified when it advances important policies of the court system, such as lowering litigation costs or allowing successful litigants a sense of repose. These and other benefits of res judicata are based on the prospect of future preclusion affecting the behavior of both the parties and future litigants. When preclusion is unforeseeable, it cannot influence the actions of anyone and, worse, causes confusion that is counterproductive. Thus, res judicata has a particular need for clear, well-known rules.

As in any area of law, the number of circumstances in which preclusion issues can arise is virtually limitless. It is therefore impossible for the framers of res judicata law to develop clear rules

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the court found that the matters sought to be precluded in this case were mediate data, it refused to invoke preclusion.

5 *Id.* at 929. While Judge Hand's suggestion concerning foreseeability was not widely accepted at the time, the American Law Institute agreed that "mediate data" were not proper subjects of issue preclusion and inserted the concept into the first *Restatement of Judgments* in a rare amendment in 1948. RESTATEMENT OF JUDGMENTS § 68 cmt. p (1942).

6 Parklane Hosiery v. Shore, 439 U.S. 322, 330 (1979).

7 Section 28(5) of the *Second Restatement* states that issue preclusion is not applicable if "[t]here is a clear and convincing need for a new determination of the issue . . . because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action." Comment i to that section adds:

> preclusion should not operate to foreclose redetermination of an issue if it was unforeseeable when the first action was litigated that the issue would arise in the context of the second action, and if that lack of foreseeability may have contributed to the losing party's failure to litigate tbe issue fully.

that will foreseeably apply preclusion whenever it would be useful to do so. The best that can be done, within the constraint of foreseeability, is to have clear rules that apply to a subset of the circumstances when preclusion, if foreseeable, would be justified. In other words, the rules of preclusion must be underinclusive.

This Note argues that the *Second Restatement*'s decision to distinguish between unforeseeable preclusion caused by changes in substantive law and that caused by changes in the law of res judicata is untenable. Unforeseeable preclusion, whatever its cause, is inconsistent with the policies underlying res judicata. Part I discusses the basic themes of modern res judicata law, as reflected in the *Second Restatement*. Part II discusses the policies underlying res judicata and argues that they are only furthered when preclusion is foreseeable. Part III uses the *Second Restatement* as an example, surveying the invitations to unforeseeable preclusion it contains and arguing that cases employing the logic reflected in those invitations have been result-oriented and have caused unacceptable confusion in the law of res judicata.

I

BASIC THEMES OF THE *RESTATEMENT*

In the first attempt to codify the law of preclusion, the *Restatement of Judgments*[8] (the "*First Restatement*") reflected the prevailing legal environment of its time, under which litigants had quasi-proprietary procedural "rights" that could not be denied because of pragmatic considerations.[9] Thus, the drafters of the *First Restatement* sought to provide clear definitions of the circumstances under which a party was to be precluded from litigating a claim or an issue.[10] Rather than providing clarity, however, these definitions tended merely to beg the question. For instance, the *First Restatement* stated that claim preclusion (which it called "merger" and "bar") results

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8 RESTATEMENT OF JUDGMENTS (1942).

9 Maurice J. Holland, *Modernizing Res Judicata: Reflections on the Parklane Doctrine*, 55 IND. L.J. 615, 620 (1980). The view of procedural rights as a form of property is also reflected in other contemporaneous legal works such as the original 1937 provisions on joinder in the Federal Rules of Civil Procedure. *See* Provident Tradesmens Bank & Trust v. Lumbermen Mut. Casualty, 365 F.2d 802, 805 (3d Cir. 1966) (en banc), *vacated sub nom.* Provident Tradesmens Bank & Trust v. Patterson, 390 U.S. 102 (1968); RESTATEMENT OF CONFLICT OF LAWS (1934). *See* Holland, *supra*, at 618-20.

10 One commentator described the *First Restatement* as providing "a lucid analysis of the principles of res judicata by making sharp distinctions among the various concepts embodied in this area of the law and by establishing a precise system of terminology, the lack of which previously had impeded consistent treatment of the problems involved." Note, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 822 (1952) [hereinafter Note, *Developments in the Law*].

from a judgment that is "on the merits."[11] It defined "on the merits," in turn, as a judgment based "on rules of substantive law,"[12] as opposed to a judgment that is "based merely on rules of procedure."[13] As any student of *Erie* doctrine[14] knows, this distinction is far from clear.[15] Similarly, the *First Restatement* attempted to clarify the scope of a claim by defining it to include all causes of action arising from the "same transaction."[16] However, as Professor Wright has observed concerning a similar definition of "claim," it "is probably sound enough, but it shows the futility of all definitions: after studying the definition we have no more idea whether a particular [claim is precluded] than we had before we started."[17]

The more recent *Second Restatement* takes a nearly opposite approach from that used by the authors of the *First Restatement*. It rejects as hopeless the attempt to provide clear rules applicable to all preclusion questions.[18] Instead, it recognizes that courts must apply some difficult concepts, such as the dimension of a claim, pragmatically with reference to a series of factors.[19] This new philosophy

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11 RESTATEMENT OF JUDGMENTS § 49 (1942).

12 *Id.* cmt. a.

13 *Id.* This distinction is further explained in an equally unhelpful passage: "If the judgment determines that the plaintiff has no cause of action, it is on the merits; but if it determines only that the plaintiff is not entitled to recover in the particular action, it is not on the merits." *Id.*

14 Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

15 *See* Hanna v. Plumer, 380 U.S. 460 (1965) (attempting to reconcile the Supreme Court's conflicting rulings on *Erie* doctrine).

16 RESTATEMENT OF JUDGMENTS § 61 (1942).

17 Charles Alan Wright, *Estoppel by Rule: The Compulsory Counter Claim Under Modern Pleading*, 39 IOWA L. REV. 255, 270 (1954). Professor Wright was referring to an attempt to explain the scope of the federal compulsory counterclaim rule, which applies to any claim that "arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim." FED. R. CIV. P. 13(a).

The *First Restatement* gave no guidance whatsoever regarding the dimensions of an "issue." *See* RESTATEMENT OF JUDGMENTS § 68.

18 "The expression 'transaction, or series of connected transactions,' is not capable of a mathematically precise definition; it involves a pragmatic standard to be applied with attention to tbe facts of the cases." RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. b (1980). The Supreme Court discussed this change from the *First Restatement* in Nevada v. United States, 463 U.S. 110, 130 n.12 (1983).

19 What factual grouping constitutes a "transaction" . . . [is] to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

RESTATEMENT (SECOND) OF JUDGMENTS § 24(2).

Reporter Benjamin Kaplan phrased this difference diplomatically:

> I think it is evident that certain changes of style are needed in the new Restatement. I mean that we must be more explicit, shall I say more frank, in describing the policy considerations that underlie this branch of law, and we must on occasion be frank and express our doubts and dubieties.

50 A.L.I. PROC. 261 (1974) (statement of Justice Kaplan).

reflects a modern trend that regards the law as too complex to be reduced to a set of clear rules, and that recognizes the need for flexibility and discretion if courts are to apply procedural standards equitably.[20] In short, the question is no longer "What does the party have a right to?" Rather, the question is "What is reasonable?"[21]

The *Second Restatement* gives courts the discretion to suspend the rules in the name of justice. For instance, it allows a party who can show a "clear and convincing need for a new determination of the issue" to win a fresh hearing on the facts, even when the black letter rules of preclusion would block relitigation of the issue.[22] A party could base this showing on several factors, including, among others, the "potential adverse impact of the determination on the public interest";[23] the unforeseeablity, at the time of the initial suit, that the issue would arise in a later suit;[24] or, most generally, the lack of "an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action."[25]

The drafters of the *Second Restatement* were concerned that, if courts applied established limitations in the law of preclusion too rigidly, some litigants, who deserved to be precluded because they

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20 "[T]here is real reason to wonder whether it is possible to draft a formal rule [of claim preclusion] without curtailing unduly the flexibility that is needed in responding to more difficult questions." WRIGHT, MILLER & COOPER, *supra* note 1, § 4407 at 51.

In general, since colonial times, American civil procedure has steadily moved away from the rigidity of the common-law writs and towards the more flexible procedures found in equity. *See* Stephen N. Subrin, *How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987). Res judicata jurisprndence typifies the pattern that this trend has followed in recent years: an extremely rigid approach during the 19th century, *see infra* notes 79-81 and accompanying text; Holland *supra* note 9, at 617-618, followed by a slightly less rigid codification developed in the 1930s (the *First Restatement*, published in 1942), which was in turn followed by a dramatically more flexible codification developed in the late 1960s and early 1970s (the *Second Restatement*, published in 1980). This pattern also appears, for instance, in joinder rules, which evolved from the extremely narrow provisions of the 19th century Field Code, into the more liberal provisions of the original 1939 version of the Federal Rules of Civil Procedure, and finally into the highly discretionary approach taken by the 1966 amendments to the Federal Rules of Civil Procedure. *See* Subrin, *supra*, at 936, 963-64; Provident Tradesmens Bank & Trust v. Patterson, 390 U.S. 102, 116 n.12 (1969). A similar change was made between the 1934 *Restatement of the Conflict of Laws* and the 1969 *Restatement (Second) of the Conflict of Laws*. *See* Arthur Taylor Von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 963-64 (1975). *See also supra* note 9 (discussing past views of procedural rights as a form of property).

Professor Kaplan, later an Associate Justice of the Massachusetts Supreme Judicial Court, was the reporter for both the 1966 amendments to the Federal Rules, 39 F.R.D. 69, 85-111 (1966), and the first *Tentative Draft* of the *Second Restatement*, RESTATEMENT (SECOND) OF JUDGMENTS (Tentative Draft No. 1, 1973), which included most of the provisions discussed in this Note.

21 Holland, *supra* note 9, at 619-20.

22 RESTATEMENT (SECOND) OF JUDGMENTS § 28(5) (1980).

23 *Id.*

24 *Id.*

25 *Id.*

had already had a fair opportunity to present their case, would be allowed to relitigate.[26] Thus, while the *Second Restatement* sets forth limitations to the rules of res judicata in order to define the situations under which preclusion should *not* be invoked, it consistently refuses to state the limitations categorically, and thereby offers courts room to create novel exceptions to the limitations.[27] In allowing courts to create these exceptions to the limitations, the *Second Restatement* errs, because these innovations will be inherently unforeseeable.

II

PRECLUSION NEEDS TO BE FORESEEABLE

A. The Policies Underlying Res Judicata

Commentators tend to focus on three basic goals of procedural systems: accuracy, efficiency, and fairness. Each of these words is used in this context in a highly specific manner. Accuracy refers to achieving an accurate resolution of the merits of a case, rather than accurately adjudicating whatever procedural issues arise.[28] "A finding of correct answers to the disputed questions of fact is . . . a necessary condition for doing legal justice."[29]

Efficiency refers to minimizing the "direct costs" of litigation (which include "the time of lawyers, litigants, witnesses, jurors, judges, and other people, plus paper and ink, law office and court house maintenance, telephone service,")[30] as well as the costs that result from delay.[31] It does not refer to the law and economics defi-

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26 *See infra* part III.C.1.

27 RESTATEMENT (SECOND) OF JUDGMENTS § 20 cmts. d (discussed *infra* part III.B.1.a. and accompanying text) and k (discussed *infra* part III.B.1.b. and accompanying text); § 26 cmts. a (discussed *infra* part III.B.2.b. and accompanying text) and b (discussed *infra* part III.B.2.a. and accompanying text); § 27 cmt. e (discussed *infra* part III.A.1. and accompanying text); § 28 cmt. f (discussed *infra* part III.A.2. and accompanying text).

28 Martin P. Golding, *On the Adversary System and Justice*, *in* PHILOSOPHICAL LAW 98, 107 (Richard Bronaugh ed., 1978). *See also* Walter V. Schaefer, *Is the Adversary System Working in Optimal Fashion?*, 70 F.R.D. 159, 160 (1976) ("The fundamental purpose of [the adversary] system . . . is the ascertainment of the truth with respect, most frequently, to an event which took place in the past.").

29 Golding, *supra* note 28, at 107.

30 Richard Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 401 (1973).

31 *See* Edmund H. Morgan, *Foreword* to MODEL CODE OF EVIDENCE 3 (1942) ("Prompt decision on the merits is imperative, for justice delayed is often justice denied.").

nition of judicial efficiency, which has been most recently expressed as "minimiz[ing] the sum of error [costs] and direct costs."[32]

Fairness is not used in its broadest sense, which would include almost all goals of a legal system, including efficiency and accuracy. Rather, it is used narrowly, to mean that the system must conform to the basic expectations of the parties. "To facilitate acceptance of the outcome and resort to the process, the rules should be seen as 'fair' in terms of prevailing community values . . . ."[33] These competing goals frequently conflict.[34]

1. *The Benefits of Res Judicata*

a. *Fairness*

i. *Repose*

Res judicata ensures the judicial system's fairness to litigants by protecting the victors' legitimate expectation that judgments will be final. The primary interest is in protecting the litigants' sense of repose.[35] "We want to free people from the uncertain prospect of

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32 Posner, *supra* note 30, at 401; *see also* CHARLES P. CURTIS, IT'S YOUR LAW 3-4 (1954) (defining judicial efficiency as "giv[ing] the algebraic maximum of satisfaction to both parties."

33 Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 938 (1975). For instance, the Fifth Amendment privilege against self-incrimination is viewed by our traditions as a matter of fundamental fairness, Malloy v. Hogan, 378 U.S. 1, 9 (1964), as is the rule against being forced to litigate in an unreasonable forum, *see* International Shoe v. Washington, 326 U.S. 310, 316 (1945), and the rule requiring notice and an opportunity to opt out of certain class actions, *see* Phillips Petroleum v. Shutts, 472 U.S. 797, 812 (1985).

34 For examples of the tension between accuracy and fairness, see James v. Illinois, 493 U.S. 307, 322-23 (1990) (Kennedy, J., dissenting) (discussing the balance between protecting fairness by excluding illegally seized evidence and promoting the truth seeking function of courts by using all available evidence); ROBERT SUMMERS ET AL., LAW: ITS NATURE, FUNCTIONS AND LIMITS 112 (3d ed. 1986) ("The pursuit of truth may . . . be subordinated to still other social aims. . . . Thus, the adjudicator may be forced to apply [evidentiary privileges] that limit or close off relevant lines of factual inquiry altogether."). For an example of the tension between efficiency and fairness, see Posner, *supra* note 30, at 401:

> [C]onsider the question whether the defendant in an administrative action (such as deportation . . .) should be entitled to a trial-type hearing. The tendency in the legal discussion of this question has been to invoke . . . a purely visceral sense of fairness . . . . [In an economic approach], the increment in error cost [from the denial of the hearing] must be compared with the direct costs of the hearing.

For examples of the tension between accuracy and efficiency, see *id.* at 402 ("[I]n general, we would not want to increase the direct costs of the legal process by one dollar in order to reduce error costs by 50 (or 99) cents."); Morgan, *supra* note 31, at 3 ("Sometimes a wrong decision quickly made is better than a right decision after undue procrastination. 'Some concession must be made to the shortness of human life'.").

35 In this and other ways, res judicata is quite similar to the statute of limitations. Both doctrines exist largely to protect repose. Both have a penalty aspect because they deprive a litigant of a claim for failure to file it at the proper time. David P. Currie, *Res*

litigation, with all its costs to emotional peace and the ordering of future affairs."[36] Res judicata allows former litigants to talk safely about the matters at issue in the suit without fear of later being quoted in court, and relieves those litigants of the need to preserve evidence or retain lawyers. As the Supreme Court has observed,

> the very object for which civil courts have been established . . . is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if . . . conclusiveness did not attend the judgments of such tribunals.[37]

Related to repose is the cost involved in repeated litigation to protect a victory. Such costs are not only wasteful, they are unfair to the originally victorious party. This situation is far worse if the victor has the misfortune of facing a "wealthy, wishful or even paranoid adversary"[38] who may be willing and able to litigate endlessly, forcing the victor to choose between an extortionate settlement and financial ruin from endless legal fees.[39]

ii. *Reliance*

Society strongly encourages parties to rely on legal declarations of their entitlements and responsibilities. In this vein, judgments and preclusion are similar to contracts and contract law. Just as contracts have social value in allowing persons to efficiently order their affairs,[40] the value of judgments stems from the parties' determina-

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Judicata: The Neglected Defense, 45 U. CHI. L. REV. 317, 337 (1978); *see also infra* notes 63-67 and accompanying text (res judicata); Flores v. Edinburg Consol. Indep. Sch. Dist., 741 F.2d 773, 777 (5th Cir. 1984) (statute of limitations). Both can also lead to harsh consequences, because they deprive litigants of what may be just claims, and thus these doctrines may give their opponents a windfall. *See also infra* notes 105-09 and accompanying text (discussing how courts occasionally refuse to apply both doctrines for equitable reasons).

36 WRIGHT, MILLER & COOPER, *supra* note 1, § 4403, at 15.

37 Southern Pac. R.R. v. United States, 168 U.S. 1, 49 (1897), *quoted in* Nevada v. United States, 463 U.S. 110, 129 (1983).

38 WRIGHT, MILLER & COOPER, *supra* note 1, § 4403, at 14; *see also* Magnus Elec. v. La Republica Argentina, 830 F.2d 1396, 1403 (7th Cir. 1987) ("Res judicata protects a victorious party from being dragged into court time and time again by the same opponent on the same cause of action."); James W. Moore & Thomas S. Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301, 308 (1961) (stating that one of the primary purposes of res judicata is to prevent litigants from harassing others with repeated suits).

39 For examples of repetitive litigation that was abusive enough to warrant the issuance of an injunction against further suits, see WRIGHT, MILLER & COOPER, *supra* note 1, § 4405, at 40 n.27.

40 L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest In Contract Damages* (pt. 1), 46 YALE L.J. 52, 61 (1936).

tion of their rights and obligations. Just as businessmen have little incentive to make a contract that they cannot rely upon,[41] litigants have little reason to go to court to seek a favorable judgment if they fear betrayal of their trust in the judgment. Just as contract law exists to promote reliance,[42] a key purpose of preclusion is to assure litigants that they may rely on a judgment in ordering their affairs.[43]

Reliance concerns are of particular importance when litigation involves determining a legal status (as opposed to pure monetary damages). Courts rely heavily on the results of suits that determine personal status (e.g., paternity, divorce or denaturalization actions),[44] or suits that determine ownership of property.[45] Commentators and courts have noted that suits over pensions,[46] water rights,[47] and the validity of contracts raise similar issues.[48] In addition, reliance is at the core of suits that seek a declaratory judgment.[49] Finally, while reliance issues are less obvious in purely

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41 *Id.* at 61-62.

42 *Id.* at 62.

43 *See, e.g.*, Montana v. United States, 440 U.S. 147, 153-54 (1979).

44 *See* WRIGHT, MILLER & COOPER, *supra* note 1, § 4416, at 140. Personal status includes factors such as marriage, paternity or citizenship. *Id.*

45 *Id.*

46 *Id.*

47 *See* Oglala Sioux Tribe v. Homestake Mining Co., 722 F.2d 1407, 1409 (8th Cir. 1983).

48 Wright, Miller, and Cooper argue that in some situations, reliance on a prior determination justifies "defense preclusion," under which a defendant is precluded from raising defenses in a second suit that would undermine the plaintiff's reliance on his first victory. This suggestion is never considered by the *Second Restatement*. *See infra* note 131.

49 *Fair Administrative Procedure for Federal Agencies is Offered in Improved Draft of a Proposed Bill*, 30 A.B.A. J. 6, 11 (1944).

Some cases and commentators argue that res judicata also preserves fairness by protecting the litigants' expectation that the law will be consistent. *See, e.g.*, WRIGHT, MILLER & COOPER, *supra* note 1, § 4403, at 12-13. However, this view is misleading, because res judicata often has the opposite effect, freezing decisions later viewed as erroneous on either the facts or the law. *See, e.g.*, Federated Dep't Stores v. Moitie, 452 U.S. 394 (1981) (precluding parties who failed to appeal, even though appealing coparties had succeeded in overturning the judgment upon which preclusion was based); Reed v. Allen, 286 U.S. 191 (1932) (upholding claim preclusion in two suits that ended inconsistently and gave possession of a piece of property to one party and rents to the other); United States v. Moser, 266 U.S. 236 (1924) (upholding issue preclusion on the amount of the plaintiff's pension even though the law subsequently changed and was applied differently to similarly situated parties); Harrington v. Vandalia-Butler Bd. of Educ., 649 F.2d 434 (6th Cir. 1981) (precluding a claimant under Title VII who lost a claim based on a reading of the law that was subsequently reversed). Indeed, sometimes exceptions must be made in res judicata specifically to avoid unacceptable inconsistencies. *See* Christian v. Jemison, 303 F.2d 52 (5th Cir.), *cert. denied*, 371 U.S. 920 (1962), discussed *infra* notes 105-06 and accompanying text.

In some circumstances, issue preclusion will not apply if the law has changed, so long as the issue in question is also a matter of law. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28(2). This exception does not apply to claim preclusion. *See Harrington*, 649 F.2d at 400.

monetary suits, they can arise whenever either party makes financial plans based on the results of prior litigation.[50]

b. *Efficiency*

Courts frequently justify preclusion as necessary to reduce overcrowded dockets.[51] Res judicata, however, is neither designed nor able to reduce the total amount of litigation in the court system. For instance, even if a suit survives a motion to invoke preclusion, it is still likely to settle before trial. Recent statistics suggest that, because of the overwhelming tendency of civil cases to settle, a court would have to preclude more than 20 suits to avoid one trial.[52] Similarly, the declining percentage of cases that actually go to trial ensures that issue preclusion, which can only be invoked on the basis of a previous trial,[53] will be available in proportionally fewer cases.[54] Most importantly, the court system is already running at capacity with delays of several years between filing and trial.[55] Thus, if a trial is avoided in one case through the use of preclusion, another trial, which might otherwise have been forced into settlement by excessive delay, will take its place.[56]

The true efficiency benefit of res judicata is the reallocation of legal resources away from cases that can be resolved through preclusion. Preclusion lowers the direct litigation costs both for the parties in those precluded cases and for parties to other suits which advance on the docket as a result of the prior preclusion.[57] Minimization of direct costs is critical because society gains little from most

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50 *See* Note, *Developments in the Law*, *supra* note 10, at 828.

51 *See, e.g.*, *Federated Stores*, 452 U.S. at 401.

52 *See* H. LAURENCE ROSS, SETTLED OUT OF COURT 179 (1980) (finding that 2123 out of 2216 insurance cases studied in 1962 settled); George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 540 (1989) (finding that the settlement rate in county and municipal courts in Chicago ranged from 95% to 98% between 1958 and 1973). Assuming that, had they not been precluded, precluded parties would not exhibit radically different settlement behavior from other litigants, these statistics indicate that preclusion does little to reduce docket pressure.

53 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 1.

54 Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 820 n.11 (1989).

55 *See, e.g.*, Priest, *supra* note 52, at 532, 549 (finding that the average time for a suit to progress from filing to trial in Cook County (Illinois) Circuit Court from 1959 to 1979 was 4.71 years).

56 *See id.* at 535-36; Posner, *supra* note 30, at 448.

57 [O]ne largely public purpose [of preclusion] has been found in preserving courts against the burdens of repetitious litigation. Although this concern has been voiced in terms that reflect current struggles with docket pressure, it is far from new. Since courts sit to resolve disputes, the most attractive way of separating this concern from the need to protect individual litigants against the same burdens is to focus on the need to ration access to a scarce public resource. The parties may be fairly required to make the most of their first opportunity in court, rather than

litigation. While publicized litigation and test cases can have important collateral benefits,[58] the only benefit of the typical private, unpublicized law suit is the resolution of the dispute before the court. Any expenditure in the case beyond that necessary to resolve the dispute is entirely wasted.

As the costs and delays of litigation escalate, justice becomes less available to society's disadvantaged, who are often most in need of its protection.[59] The poor are forced to accept inadequate settlements and, as litigation costs escalate over time, are forced to pay a larger share of their recovery to their contingent-fee lawyers.[60] Litigation costs also burden the wallets of the general public, either through increases in insurance rates[61] (which are passed on to the public), increased burdens on publicly funded legal services budgets, or misallocation of precious judicial time, which has been estimated to cost $600 per hour.[62]

Res judicata promotes efficiency in two ways. First, it acts as a "procedural penalty imposed upon a party who neglects procedural duties"[63] to bring suits in "packages"[64] that minimize overall litigation costs while preserving the fairness of the system. For example, claim preclusion and the related compulsory counterclaim rule (which extends claim preclusion to the defendant), force parties to consolidate related actions. Even if the issues in the related claims differ in important respects, claim preclusion, by forcing considera-

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delay the first opportunity of others or require society to support an expanded court system.

WRIGHT, MILLER & COOPER, *supra* note 1, § 4403, at 13. While Wright, Miller, and Cooper express this argument, they are skeptical of it. *See id.* at 13-14.

58 *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

59 "[T]he effect of long court delays does not fall equally on all members of society—although a large corporation may be able to wait many years to obtain a tort or contract recovery, or may be content to defer liability for that length of time, someone who is poor and seriously injured may find that justice delayed is indeed, as the saying goes, justice denied." AM. LAW INST., COMPLEX LITIGATION PROJECT 21 (Tentative Draft No. 1, 1989).

60 If the amount of recovery is held constant, any increase in the cost of litigation will result in contingent-fee attorneys demanding a higher percentage of the recovery in future cases.

61 A recent study found that of the money spent settling asbestos claims, plaintiffs received only 37%. The rest went to pay the lawyers. Alvin B. Rubin, *Mass Torts and Litigation Disasters*, 20 GA. L. REV. 429, 429-30 (1986). Because the insurer ends up paying for both sets of lawyers in a typical contingent fee situation, this data shows that the cost of litigation has almost twice the effect on insurance rates as the cost of injuries.

62 A. Leo Levin & Denise D. Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 227 (1985).

63 Ernst Schopflocher, *What is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata*, 21 OR. L. REV. 319, 363-64 (1942).

64 Professor McCoid originated the use of the term "package" to describe the collection of persons and parties before the court in a given suit. John C. McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707, 708 (1976).

tion of the additional issues in the initial suit, avoids a second round of discovery and pretrial motions, as well as the need to educate a second jury on the background facts of the case. Defensive, nonmutual issue preclusion[65] broadens this rule to include situations in which a plaintiff wishes to sue two defendants in closely related but distinct suits. If the plaintiff brings the suits separately, he wins only one of the suits if he wins, but he loses both suits if he loses.[66] The plaintiff is therefore almost certain to combine them.[67]

Res judicata also reduces litigation costs by precluding a litigant from contesting an issue he has already lost in a proceeding where he had a "full and fair opportunity to litigate."[68] Here, the purpose is not to punish the litigant for past inefficient action,[69] but rather to reallocate resources to where they are most needed.[70] The "full and fair opportunity to litigate" ensures both that due process is satisfied, and that the past proceedings were sufficiently rigorous to make the subsequent court doubt that it will have a better opportu-

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65 Issue preclusion is called "nonmutual" when a party precludes his opponent on an issue his opponent lost in a prior trial in which the precluding party was not involved. Such preclusion is nonmutual because, although a party can benefit from his opponent's loss in another suit to which he was not a party, his opponent can never use her own victory in a suit to preclude him—every opponent has a due process right to at least one opportunity to be heard on each issue. Nonmutual preclusion is called "defensive" when a court allows the defendant in the present suit to preclude the plaintiff from relitigating issues that were decided against the plaintiff in a prior suit in which the defendant was not involved.

66 This imbalance of risk is discussed extensively in Note, *A Probabilistic Analysis of the Doctrine of Mutuality of Collateral Estoppel*, 76 MICH. L. REV. 612 (1978) [hereinafter Note, *Probabilistic Analysis*].

67 *See* Holland, *supra* note 9, at 627 n.33.

68 RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1980). *See also id.* § 28(3), 28(5).

69 For example, in mutual issue preclusion (the parties to the second suit are the same as the parties to the first), no one has necessarily done anything inefficient, and neither side benefits from a failure to consolidate the suits. Rather, the stakes in the first suit are automatically increased by allowing the first resolution of issues to preclude in subsequent litigation. Of course, this applies only if the suits are sufficiently different that claim preclusion does not apply. Since one of the factors of the *Second Restatement*'s test for claim preclusion is how far the witnesses or proofs overlap between the two cases, RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. d, issue preclusion often does not come into play because claim preclusion blocks the second suit.

Nonmutual issue preclusion also normally does not function as a penalty. While defensive nonmutual preclusion can deter plaintiffs from suing numerous defendants individually, *see supra* notes 65-67 and accompanying text, this will only have an influence when all claims are ripe at the same time. When claims arise against different defendants at different times, however, joinder is impossible, so it makes no sense to penalize a litigant for not bringing one consolidated package. Offensive nonmutual issue preclusion, which occurs when the *plaintiff* invokes nonmutual preclusion, is rarely justifiable as a penalty, because the precluded defendant usually could not have forced the current plaintiff into the prior suit. *See* Holland, *supra* note 9, at 627-28 n.33.

70 *See supra* notes 57-58 and accompanying text; WRIGHT, MILLER & COOPER, *supra* note 1, § 4403, at 15-16.

nity to discover the truth of the matter.[71] Thus, courts can legitimately dispose of previously litigated issues summarily, saving time and money for both the litigants and the judicial system.

2. *The Costs of Res Judicata*

a. *Fairness*

Perhaps the greatest cost of res judicata is its harshness. One of the most fundamental principles of the American judicial system is the right of every litigant to an opportunity to be heard. When a party is precluded, however, she has no right to be heard on the merits of the case and automatically suffers an adverse determination of the claim or issue in question.

b. *Efficiency*

In minimizing overall litigation costs, a system of preclusion must look beyond the cost of a trial in a given suit and consider two kinds of unnecessary litigation expenses res judicata itself may cause. The first is the cost of threshold litigation concerning the very issue of preclusion. Res judicata must be administrable without a long and expensive inquiry into the nature of the prior suit, because having a trial to avoid a trial would be senseless.[72] Similarly, if a formulation of res judicata invites litigants to file preclusion motions with little chance of success, the cost of unsuccessful motions for preclusion may outweigh the trial time saved by the successful motions.[73]

A second unnecessary litigation expense could arise if strict rules of res judicata force litigants into a wasteful "use it or lose it" mentality. The threat of expansive claim preclusion could cause plaintiffs to raise collateral disputes that might otherwise be settled

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71 While the prior judgment is certainly not "absolute truth," *see infra* notes 82-84 and accompanying text, it is sufficiently reliable for a court to conclude that no further judicial resources should be spent on the case. This is a pragmatic notion that should be frankly seen as undermining accuracy, because any new evidence that has come to light since the first suit is never heard.

72 *See* Holland, *supra* note 9, at 639 (discussing the expense incurred when parties seek to invoke offensive nonmutual issue preclusion, and the court must inquire whether the defendant had a "full and fair opportunity to litigate."). *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 29; WRIGHT, MILLER & COOPER, *supra* note 1, § 4408, at 72 (warning against "rules that require detailed inquiry before a second action can be dismissed as precluded."); *id.* § 4420, at 191 (noting that preclusion is worthless when a jury trial is needed to determine what was decided in the prior case).

73 *See infra* notes 142-45 and accompanying text. *See also* Currie, *supra* note 35, at 350 (expressing concern over "the cost and uncertainty of making case-by-case inquiries); WRIGHT, MILLER & COOPER, *supra* note 1, § 4416, at 143 ("Uncertain and ambiguous rules invite second litigation in an effort to test the limits of preclusion.").

amicably or forgotten.[74] Similarly, if litigants fear that courts will apply issue preclusion to any tangential issue mentioned at trial, they might contest even trivial matters that they would otherwise only mention in passing.[75] Litigation of these collateral matters may be especially costly, since it can greatly increase the complexity of the suit.[76]

c. *Accuracy*

At first glance, preclusion seems to have little to do with accuracy. One of the foundational principles of res judicata is that neither errors in the prior proceeding, nor the merits of the present case, have any relevance to a court considering a motion to preclude. As the Supreme Court stated over a century ago, "[A] judgment . . . is conclusive . . . although it be subsequently alleged that perfect defences actually existed. . . . If such defences were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence."[77] Recently, the D.C. Circuit went so far as to sanction a lawyer with double costs and attorney fees after he sought reversal based on the alleged erroneous outcome of the earlier judgment of a dismissal on res judicata grounds.[78]

Consequently, res judicata merely reaffirms a prior judgment, and neither adds nor subtracts from the accuracy of that judgment. Since society is willing to apply the force of the state to enforce the prior judgment's determination of the rights and obligations of the parties, it should be equally willing to use that judgment to determine the result of future suits as well. On the other hand, because preclusion merely accepts the prior judgment as correct, it does nothing to increase society's confidence in the prior judgment. Preclusion and accuracy seem simply unrelated.

Thus, any suggestion that res judicata undermines the accuracy function of courts appears far-fetched. Courts that invoke preclu-

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74 *See* WRIGHT, MILLER & COOPER, *supra* note 1, § 4407, at 51-52; Freer, *supra* note 54, at 814.

75 *See* WRIGHT, MILLER & COOPER, *supra* note 1, § 4416, at 143; Currie, *supra* note 35, at 341; Alan N. Pollasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 IOWA L. REV. 217, 220 (1954).

76 *See* WRIGHT, MILLER & COOPER, *supra* note 1, § 4408, at 70-71; Freer, *supra* note 54, at 814.

77 Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1877). *See also* Federated Dep't Stores v. Moitie, 452 U.S. 394, 398 (1981) ("[T]he res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case."). For additional cases, see WRIGHT, MILLER & COOPER, *supra* note 1, § 4403, at 17-18 n.14.

78 Holmes v. District of Columbia, 801 F.2d 1371, 1373 (D.C. Cir. 1986).

sion appear to reach the same result they would reach at trial, because they merely reaffirm the victory of a party who has already prevailed after a full judicial inquiry into the matter.[79] It therefore seems highly unlikely that revisiting the facts would produce a different result. Any argument that the prior action was erroneous must yield to the general assumption of the prior trial's legitimacy. This view comports with the nineteenth century view of res judicata, when courts viewed a prior judgment as "irrefragable truth,"[80] and spoke of the victors as having a quasi-proprietary "right" to preclude.[81]

Under closer examination, however, this assumption fails. Rather, quite the opposite is true. Jurists who develop the law of res judicata, whether judges or members of the American Law Institute, must assume that those precluded by the rules they announce would win on the merits. This result is required on three levels. First, modern procedure rejects the notion of a prior judgment as "irrefragable truth."[82] As Professor Currie so eloquently stated:

> We cannot know in terms of absolute truth whether the actor committed the wrong or not. Courts can only do their best to determine the truth on the basis of the evidence; and the first lesson one must learn in the subject of res judicata is that judicial findings must not be confused with absolute truth.[83]

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79 In nonmutual preclusion, res judicata reaffirms the defeat of the precluding party's opponent, instead of reaffirming the precluding party's own victory.

80 Washington, Alexandria & Georgetown Steam-Packet Co. v. Sickles, 65 U.S. 333, 343 (1860); Jeter v. Hewitt, 63 U.S. (22 How.) 352, 364 (1859). This concept is discussed in Holland, *supra* note 9, at 617 n.10.

81 Holland, *supra* note 9, at 619-20. *See also supra* note 9 (discussing past views of procedural rights in other areas).

82 *See* WRIGHT, MILLER & COOPER, *supra* note 1, § 4416, at 142 ("[T]he first litigated determination of an issue may be wrong. The risk of error runs far beyond the proposition that most matters in civil litigation are determined according to the preponderance of the evidence. The decisional process itself is not fully rational . . . ."); Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 315 (1957) (quoted *infra* text accompanying note 83); Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 12 (1951) ("The administration of justice is no more designed to elicit the truth than the scientific approach is designed to extract justice from the atom."); Lawrence C. George, *Sweet Uses of Adversity: Parklane Hosiery and the Collateral Class Action*, 32 STAN. L. REV. 655, 657 (1980) (describing trials as "experiments concerning the merits of issues."); McCoid, *supra* note 64, at 707 ("[I]t is easy to see that different triers of law and fact, responding perhaps to slightly different evidence or presentation at different times or places, might well reach different judgments on the same transaction."); Morgan, *supra* note 31, at 3-4 (stating that "a lawsuit is not, and cannot he made, a scientific investigation for the discovery of the truth . . . [T]here must be recognition at the outset that nicely accurate results cannot be expected."); Note, *Probabilistic Analysis*, *supra* note 66, at 626 ("A case might be litigated and relitigated indefinitely, always with the same result, without providing any assurance that the trier of fact has determined the 'truth.' ").

83 Currie, *supra* note 82, at 315.

Courts, therefore, rarely can say with confidence that the trial prevented by preclusion would not have reached a different result. Consequently, preclusion today is viewed as a matter of public policy, not of "rights" or "irrefragable truth."[84]

Second, the precluded party may well have won the prior trial, but either lost on appeal on a legal point or failed to include a related claim or counterclaim. Thus, at least in claim preclusion, courts often have strong reason to believe that they are precluding a party who would succeed on the merits.[85] This is particularly clear when a victory in a prior trial is reversed on appeal, based on an interpretation of the law later rejected by the Supreme Court.[86]

Third, and more importantly, in developing rules of res judicata, a jurist is declaring that the merits of the case are entirely irrelevant. Beyond the pronouncements of the Supreme Court, judges applying rules of res judicata (whether developed by themselves or by others) are not permitted to consider either party's actual likelihood of success on the merits.[87] Thus, when a court determines the

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84 Holland, *supra* note 9, at 619-20.

85 The Supreme Court has invoked preclusion based on erroneous judgments on several occasions. For example, in Federated Dep't Stores v. Moitie, 452 U.S. 394 (1981) and in Reed v. Allen, 286 U.S. 191 (1932), the Court applied preclusion to an unappealed judgment that was shown to be erroneous by a subsequent appeal in a related case. For an example of a state court doing the same thing, see Belliston v. Texaco, 521 P.2d 379 (Utah 1974) (*Belliston II*), discussed *infra* notes 179-92 and accompanying text.

86 An excellent lower court case giving judgment to the party who would probably have lost on the merits is Harrington v. Vandalia-Butler Bd. of Educ., 649 F.2d 434 (6th Cir. 1981) (*Harrington II*), in which a litigant had sued for sex discrimination under Title VII and had proved her factual allegations in the first case, only to lose on appeal on the ground that Title VII did not authorize the type of damages sought. Harrington v. Vandalia-Butler Bd. of Educ., 585 F.2d 192 (6th Cir. 1978) (*Harrington I*), *cert. denied*, 441 U.S. 932 (1979). The trial court's findings of fact in favor of the plaintiff were affirmed on appeal. *Id.* When, in another case decided while the appeal was pending, the Supreme Court overturned prior precedent and allowed such damages under 42 U.S.C. § 1983, Monell v. Department of Social Serv., 436 U.S. 658 (1978), *overruling* Monroe v. Pape, 365 U.S. 167 (1961), the plaintiff immediately sued again under § 1983, only to be blocked by claim preclusion. *Harrington II*, 649 F.2d at 436-40. While the Sixth Circuit, in affirming the use of claim preclusion, recognized that "in the circumstances of this case the doctrine of res judicata seems to work an unfair result," *id.* at 440, that nod to accuracy did not influence their decision.

87 This rule is present for a number of reasons. First, preclusion arises on a motion for summary judgment, when the trial court is forbidden to weigh the evidence, but rather must believe the contentions of the nonmovant (the party to be precluded). Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Second, court's ability to grant summary judgment on the merits of the controversy would be an independent ground for summary judgment, not a reason to preclude. Third, if a court grants preclusion based on a questionable view of res judicata because it flatly does not believe one party and wishes to avoid a trial, it is lying. It represents to the world that the merits were irrelevant, when in fact they were controlling. Finally, when faced with a motion for preclusion, the responding party has no reason to believe it must address the merits of the controversy as well. Consequently, when a court entertaining a motion for preclu-

procedural circumstances that justify preclusion, it is declaring that, no matter how meritorious the precluded party's claims are, he will not be given even an opportunity to be heard.[88] As the Supreme Court has said, res judicata "blockades unexplored paths that may lead to truth [and] shields the fraud and the cheat as well as the honest person. It therefore is to be invoked only after careful inquiry."[89] A jurist can only legitimately declare such a rule if it assumes that the rule will be applied by frauds and cheats against parties with compelling cases,[90] and determines that the policies of res judicata are so weighty that the trial court should still invoke preclusion.

In sum, a court granting summary judgment on res judicata grounds does not say "we know the truth, and it is against you." Rather, it says "even assuming that everything you allege is true and would be proven at a trial on the merits, the policies of res judicata are so strong that we would prefer to give judgment to the wrong party than allow you a chance to prove your case at trial."[91] This

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sion considers the merits of a suit, it is denying the nonmovant an opportunity to be heard.

88 There is a crucial difference between a court developing rules of preclusion and a court applying those rules. When a trial court has discretion to preclude or not, it participates in defining the rules of preclusion and must consider the implications of its declaration that the substantive merits of the controversy are irrelevant under these procedural circumstances. However, when a trial court finds procedural facts under which precedent requires precluding one party, the trial court is not participating in the shaping of the rules of res judicata. Rather, it is only performing a ministerial function in applying the precedential requirements to the facts. In those circumstances, it has no responsibility for the decision that the substantive merits are irrelevant.

89 Brown v. Felsen, 442 U.S. 127, 132 (1979).

90 Professor Wright is quite colorful in his description of the potential precluded party as "[a] deserving widow, a horde of hungry orphans clutching at her tattered shawl, who is euchred out of her just claim against the scheming banker because of her inexperienced lawyer's failure [to understand the rules of preclusion.]" Wright, *supra* note 17, at 264. Professor Wright was specifically referring to the compulsory counterclaim rule.

In a couple of reported cases the applying court could not stomach the injustice that preclusion would create. *See* Christian v. Jemison, 303 F.2d 52 (5th Cir. 1962); Spilker v. Hankin, 188 F.2d 35, 38-39 (D.C. Cir. 1951). For a discussion of both, see *infra* notes 105-07 and accompanying text. However, the presence of a couple extreme cases does not change the duty of jurists announcing rules of preclusion. Because the overwhelming majority of applying courts will not consider the merits, those framing res judicata doctrine must only endorse rules that should apply when the precluded party has a worthy case that it would prove at trial.

91 In some situations, res judicata arguably increases accuracy by ensuring that litigants get only one chance to recover. For example, in a close factual case in which the plaintiff has a 50% chance of convincing any given jury, if a plaintiff sues several joint tortfeasors separately, he needs only win once to recover fully. If he has the opportunity to present his case to two different juries, his chance of winning increases from 50% to 75% even though his arguments have not changed at all. *See* Note, *Probabilistic Analysis*, *supra* note 66, at 640-53. In these circumstances, nonmutual issue preclusion ensures that he only has one chance to recover. *See* Holland, *supra* note 9, at 627 n.33. However,

assumption puts great pressure on res judicata and requires courts to pay careful attention to the policies that justify this harsh step.

B. The Need for Foreseeability

1. *Unforeseeability Eliminates the Benefits of Preclusion*

Because the benefits of res judicata depend on the expectation of preclusion shaping litigants' behavior, res judicata only makes sense if it is foreseeable. For example, res judicata cannot possibly succeed in forcing litigants to bring suits in efficient "packages" if the litigants do not know what claims those packages are supposed to contain.

Unforeseeable doctrines of preclusion fare little better regarding the fairness-based objectives of reliance and repose. Foreseeable or not, whenever a motion for preclusion is granted, a party is spared "the expense and vexation attending multiple lawsuits."[92] Beyond that, however, the peaceful repose that res judicata seeks to foster cannot exist so long as a litigant reasonably fears that he may be forced to relitigate the matters he won in a past suit.[93] Similarly, as long as the law of preclusion is unclear, litigants will lack the confidence necessary to rely on the results of past litigation.[94]

2. *Unforeseeability Increases the Costs of Res Judicata*

Unforeseeable preclusion also exacerbates the costs of res judicata. The accuracy cost remains constant, because the correctness of the prior decision is not altered by the unforeseeability of the subsequent preclusion. The costs in terms of both fairness and efficiency, however, increase as preclusion becomes less foreseeable.

a. *Fairness*

Most importantly, unforeseeable preclusion unfairly deprives the litigant of his constitutionally guaranteed opportunity to be heard. Penalizing someone for failing to follow unforeseeable rules of preclusion is fundamentally unfair, because penalties are unjustified unless the doctrine "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding

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even without nonmutual preclusion the cost of additional litigation and the likelihood of impleading or intervention ensures that this scenario will not occur often.

92 Montana v. United States, 440 U.S. 147, 153 (1979).

93 *See* WRIGHT, MILLER & COOPER, *supra* note 1, § 4401, at 4.

94 *See id.*; *id.* § 4406, at 47-48. This is perhaps one reason why courts are particularly hesitant to deny preclusion when reliance is crucial (e.g., in divorce decrees and suits to quiet title). *See supra* notes 44-45 and accompanying text; Oglala Sioux Tribe v. Homestake Mining Co., 722 F.2d 1407, 1409 (8th Cir. 1983).

and practices."[95] A court that invokes preclusion in an unforeseeable manner cannot legitimately dismiss the precluded party's complaints by repeating the old slogan that "[t]he predicament in which [he] finds himself is of his own making."[96]

b. *Efficiency*

If the circumstances under which a court will apply preclusion are unclear, two kinds of unnecessary and avoidable litigation will result. First, threshold litigation over the propriety of preclusion will increase substantially, as litigants file tenuous motions for summary judgment on preclusion grounds with little chance of success.[97] Second, so long as the preclusive effects of a suit are unclear, risk-averse litigants will overlitigate collateral issues and claims for fear of being precluded later. Any burdens on the parties or the court that are avoided by invoking unforeseeable preclusion in one case are therefore not eliminated—they are transferred to litigants and courts in future cases.

Thus, when preclusion is unforeseeable, the goals of fairness and efficiency are undermined, and the ambiguities of the law create traps for the unwary and unprincipled windfalls for the fortunate. It is difficult to see what policies are advanced by flexible exceptions to limitations, beyond a result-oriented desire to avoid an expensive trial in a given case.

3. *The Tension Between Foreseeability and Flexibility*

The need for foreseeability would seem to require clear and precise rules of res judicata. However, in almost every area of the law, there is a strong tension between clarity and flexibility.[98] This

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95 United States v. Petrillo, 332 U.S. 1, 7-8 (1947). While this case dealt with actual criminal penalties, the same logic applies to procedural penalties. *See also* United States v. Papachristou, 405 U.S. 156 (1972) (striking down for vagueness a law authorizing punishment of, among others, "lewd, wanton and lascivious persons, . . . common railers and brawlers, [and] persons wandering or strolling about from place to place without any lawful purpose or object."); Coates v. City of Cincinnati, 402 U.S. 611 (1971) (striking down on vagueness grounds a law making it a crime for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by.").

96 Reed v. Allen, 286 U.S. 191, 198 (1932).

97 *See supra* notes 72-73 and accompanying text and *infra* notes 142-45 and accompanying text.

98 Commentators have discussed this tension in innumerable areas of the law. The following is a list of some of the articles discussing the tradeoff between clarity and flexibility in the last 10 years: Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1472 (1985) (Searches and Seizures); Harold H. Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441, 464 (1989) (Due Process); Eric T. Freyfogle, *Water Justice*, 1986 U. ILL. L. REV. 481, 510 (Property); Sheldon W. Halpern, *Application of the Doctrine of Commercial Impracticability: Searching for "The Wisdom of Solomon,"* 135 U. PA. L. REV. 1123, 1170 (1987) (Contract

results from the inevitable "gray area" on the fringes of even the most straightforward area of law. If the gray area is extremely small, as in the Statute of Wills, the law is clear and foreseeable, but rigid.[99] If the gray area is large, as in the "reasonable person" test of tort law, the law is flexible, but vague and unpredictable. In preclusion, as in all areas of law, the competing needs for foreseeability and flexibility must be carefully balanced.

The need for flexibility can arise in two ways. First, a compelling need to ensure that the law will not be applied in unjust circumstances may require flexible exceptions to the law. Vague criminal defenses, like justification, are a good example.[100] Second, practical

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Law); Larry Lawrence, *Misconceptions about Article 3 of the Uniform Commercial Code: A Suggested Methodology and Proposed Revisions*, 62 N.C. L. REV. 115, 118 (1983) (Commercial Law); David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937, 997 (1990) (Evidence); Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1379 (1986) (Civil Procedure); Suman Naresh, *Incontestability and Rights in Descriptive Trademarks*, 53 U. CHI. L. REV. 953, 991 (1986) (Intellectual Property); Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: The Eighth Session* (1979), 74 AM. J. INT'L L. 1, 33 (1980) (International Law); Thomas O. Sargentich, *The Reform of the American Administrative Process*, 1984 WIS. L. REV. 385, 422 (Administrative Law); Teresa M. Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 41 VAND. L. REV. 1121, 1131 (1988) (Torts); Lawrence A. Sullivan, *The New Merger Guidelines: An Afterword*, 71 CAL. L. REV. 632, 642-43 (1983) (Antitrust Law); Perry E. Wallace, Jr., *Securities Arbitration After* McMahon, Rodriguez, *and the New Rules: Can Investors' Rights Really Be Protected?*, 43 VAND. L. REV. 1199, 1250 (1990) (Securities Law); *The Supreme Court 1987 Term: Leading Cases: I. Constitutional Law*, 102 HARV. L. REV. 143, 209 (1988) (Part 1 of 2) (Equal Protection).

It has also been mentioned in many jurisprudential articles. *See, e.g.*, Craig M. Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 16 [hereinafter Bradley, *The Uncertainty Principle*]; Steven J. Burton, *Ronald Dworkin and Legal Positivism*, 73 IOWA L. REV. 109, 126 (1987); William Ewald, *Unger's Philosophy: A Critical Legal Stndy*, 97 YALE L.J. 665, 735 (1988); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjadication*, 82 NW. U. L. REV. 226, 291 (1988); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Wounds?*, 87 MICH. L. REV. 2099, 2119-20 (1989); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1259 (1985); Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 100 (1988); Robert Weisberg, *The Calebresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 254 (1983); James G. Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431, 435 (1985).

Finally, the Supreme Court has commented on this tension in two areas: the Establishment Clause, Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980), and Securities Law, Reves v. Ernst & Young, 494 U.S. 56, 63 n.2 (1990).

99 In the well-known case of Riggs v. Palmer, 115 N.Y. 506 (N.Y. 1889), the New York Court of Appeals strained to find enough flexibility in the Statute of Wills to prevent a man who murdered his grandfather from inheriting under his victim's will. Nevertheless, the opinion drew two dissents.

100 *See, e.g.*, MODEL PENAL CODE § 2.09(1) (Proposed Official Draft 1962) (excusing offenses that were coerced by threats of unlawful force "which a person of reasonable firmness in his situation would have been unable to resist"); *id.* § 2.12(3) (barring prosecutions when the court finds that the defendant "presents such [extenuations] that [the defendant's conduct] cannot reasonably be regarded as envisaged by the legislature in forbidding the offense"); *id.* § 3.02(1) (excusing criminal conduct that seeks to avoid a

considerations dictate that some laws are incapable of precise definition, so the need to implement broad substantive policy may force policymakers to accept criminal laws that are less precise than might otherwise be desired.[101]

Flexible exceptions to the rules of preclusion have quite different effects from flexible exceptions to limitations, because the former block the harshness of preclusion, while the latter invoke it. In creating exceptions to preclusion, the need for flexibility is paramount, and certain vague exceptions to res judicata in the name of justice and fair play[102] in some extreme cases are both tolerable and necessary for several reasons. Primarily, since exceptions to preclusion result in a fresh inquiry into the merits of the case, they are consistent with the accuracy function of the courts. The prior victor will be given a fair opportunity to present his evidence at the new trial, and if he has a strong case, he is likely to win again.[103] In addition, flexible exceptions to preclusion in extreme circumstances will not significantly undermine the efficiency and fairness of the system of res judicata as a whole. While all uncertainty makes preclusion less foreseeable, a few infrequently used exceptions that

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harm or evil that is "greater than that sought to be prevented by the law defining the offense charged").

101 Despite its great antipathy for vague criminal laws, *see supra* note 95, the impossibility of providing clear definitions has lead the Supreme Court to tolerate some criminal laws that are quite vague and flexible. *See, e.g.*, United States v. Petrillo, 332 U.S. 1 (1947) (allowing prosecutions against a person who coerces a broadcaster to employ "any person . . . in excess of the number . . . needed by such licensee" because, despite the vagueness of the language, no clearer language was possible); Nash v. United States, 229 U.S. 373 (1913) (allowing prosecutions for violating the provision in the Sherman Antitrust Act against "undue" restraints of trade); Roth v. United States, 354 U.S. 476 (1957) (allowing prosecution of publishers of "obscene" materials despite the notorious difficulties in defining that term).

The limitless situations in which accidents can happen also requires the hopelessly vague "reasonable person" test of tort law and frustrated Justice Holmes's attempt to bring more certainty to the area of contributory negligence in traffic accidents at railroad crossings. *See* Bradley, *supra* note 98, at 39-40.

102 The elements of fairness implicated by these concerns are not reliance and repose. Rather, fairness lies in the expectation of litigants that courts will not assist powerful litigants in abusing less sophisticated citizens. *See infra* notes 105-09 and accompanying text.

103 Of course, just as the first suit could possibly produce the objectively wrong result, *see supra* notes 82-83 and accompanying text, it is also possible that the first result was correct, and that a new trial may lead to the wrong result. This is an inevitable consequence, however, of our inability to ascertain objective truth.

In many cases, denials of preclusion might reduce accuracy, because the delay between the first and second trials could lead to the loss of physical evidence or the fading of memories. It can also be argued, however, that the party seeking to relitigate may present new evidence, or may present new theories of recovery that involve issues not raised in the prior suit. Thus, one cannot say which trial is more likely to discover the objective truth. In any case, our system uses the statute of limitations, not res judicata, to limit the prejudice caused by delay.

block preclusion will not enter into the calculus of litigants so long as the exceptions are sufficiently rare and are confined to extraordinary situations when preclusion is clearly unjust.[104]

Furthermore, in truly extraordinary cases, the invocation of preclusion will be so unjust that fairness concerns weigh for, and not against, preclusion, even when the prior victor has relied upon the past result. Society has a particular expectation of an opportunity to be heard when an unsophisticated citizen seeks relief for a gross injustice inflicted by a more sophisticated party. Thus, a pre-*Brown*[105] determination that segregated buses were constitutional did not block a post-*Brown* desegregation suit, even though claim preclusion would normally have applied,[106] and a lawyer who extorted a series of notes from an unsophisticated client and won a suit over the first note was not permitted to preclude the issue of the notes' validity in subsequent suits.[107] To this extent, the merits of a dispute are never truly irrelevant to a court considering a motion for preclusion.

On the other hand, courts sometimes enforce preclusion even if invocation seems unfair to one party, as when preclusion results from a "calculated choice" by a sophisticated litigant.[108] In these circumstances, the party created its own problem, and efficiency requires that res judicata block relitigation, lest future similarly situated litigants also seek to exploit the newly developed loophole.[109]

In short, as in criminal law,[110] where rules leading to acquittal are flexible but those imposing punishment are rigid, the balance

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104 This assumes, of course, that these cases are in fact rare. "If relitigation were permitted whenever it might result in a more accurate determination, in the name of 'justice,' the very values served by preclusion would be quickly destroyed." WRIGHT, MILLER & COOPER, *supra* note 1, § 4426, at 265.

When flexibility is used to invoke preclusion, the rarity of the doctrine has the converse effect. In the case of rare exceptions to limitations, the possiblity of an exception will still not enter the calculus of the litigants, which ensures that the exception will do little or no good. When a rare exception might block preclusion, the rarity ensures that the exception will not significantly undermine the benefits of res judicata.

105 Brown v. Board of Educ., 347 U.S. 43 (1954).

106 Christian v. Jemison, 303 F.2d 52, 54-55 (5th Cir. 1962).

107 Spilker v. Hankin, 188 F.2d. 35, 38-39 (D.C. Cir. 1951).

108 Federated Dep't Stores v. Moitie, 452 U.S. 394, 401 (1981). This case involved a corporation which, along with other local companies, sued a rival for antitrust violations. After losing in federal court, the plaintiff decided to seek a remedy in state court, while its co-parties appealed successfully. When the plaintiff later found itself precluded, it unsuccessfully argued that res judicata was inappropriate in light of the reversal won by the appealing co-plaintiffs.

109 This jurisprudence is similar to cases in which the clear terms of the statute of limitations give way to equitable concerns, a doctrine known as "equitable tolling." *See* Hallstrom v. Tillamook County, 493 U.S. 20, 27 (1989).

110 For discussion of the clarity-flexibility tension in criminal law, see *supra* notes 100-01 and accompanying text.

between flexibility and foreseeability in preclusion depends heavily on whether the uncertainty is used to impose or to block preclusion. When it is used to prevent inappropriate application of res judicata (overinclusion) through flexible exceptions in the name of fairness, concerns of flexibility are paramount, and the effect on foreseeability is minor, so long as the exceptions are used rarely enough that litigants expect the application of preclusion to the results of their disputes. Thus, the *Second Restatement* endorses flexible exceptions to the rules of preclusion whenever the precluded party can show a clear and convincing need to relitigate the matter.[111] On the other hand, when courts use uncertainty to prevent the clear limitations of res judicata from functioning as loopholes for litigants who deserve to be precluded (underinclusion), the resulting exceptions to these limitations hinder foreseeability and do little or nothing to advance the policies underlying preclusion.

By its nature, then, res judicata must be underinclusive to remain consistent with the policies it is supposed to further.[112] Thus, the proper model of res judicata law is, whenever possible, to establish clear rules, with some flexible exceptions used in rare cases, that serve only to block, but never to invoke, preclusion in unforeseeable situations.[113]

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111 RESTATEMENT (SECOND) OF JUDGMENTS §§ 26(1)(f) (1980) (claim preclusion), 28(5)(c) (issue preclusion).

112 *See* Currie, *supra* note 35, at 350 ("[T]he cost and uncertainty of making case-by-case inquiries into competing considerations may justify categorical exceptions that are in some respects overinclusive."). While Currie speaks of "categorical exceptions," he clearly refers to what this Note has been calling "limitations." Of course, the use of overinclusive limitations (because there are no exceptions to limitations) leads to an underinclusive system of preclusion.

113 This is not to say that all flexibility in the definitions of "claim" and "issue" is undesirable. Because these terms have proven impossible to define precisely, *see supra* notes 8-17 and accompanying text, foreseeability is unattainable, making a vague doctrine necessary. Thus, just as the Supreme Court has occasionally approved unclear criminal statutes when no clear definition was possible, *see supra* note 101, uncertain definitions are tolerable here.

Little confusion results from these definitions, however, because the concept is intuitively clear. As Wright, Miller, and Cooper argue regarding the *Second Restatement*'s definition of a claim, these are "not desigued for case-by-case application. [They are] fully consistent with clear rules that control the vast run of ordinary litigation definitions and tolerably predictable application in unusual litigation. [Their] advantages should outweigh the difficulties of application that inevitably will remain." WRIGHT, MILLER & COOPER, *supra* note 1, § 4407, at 56-57. These definitions easily pass the requirement that the rules "convey[ ] sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." United States v. Petrillo, 332 U.S. 1, 8 (1947).

Similarly, there is nothing wrong with exceptions to limitations per se, as long as they are clear. One example of an exception to a limitation which is both useful and clear is the two-dismissal rule. *See infra* text accompanying note 176.

4. *The Distinction Between Clear Rules and Vague Exceptions Is More than Formalism*

One possible objection to this analysis is that the distinction between flexible exceptions to rules of preclusion and flexible exceptions to limitations elevates form over substance. As long as an area of preclusion law is unclear, it does not matter whether the doctrine is phrased so that the uncertainty is part of the exception or part of the rule. Thus, courts could reach the same results as occur from exceptions to limitations on preclusion by adopting extremely broad (but clear) definitions of preclusion with sweeping, flexible exceptions that allow relitigation when necessary.[114]

This objection is without merit because such rules are inappropriate even if they are phrased in terms of clear rules and flexible exceptions. The relevant factor is not the formulation of the rules, but rather that the rules must be underinclusive. Were jurists to phrase res judicata in terms of a clear and extremely broad doctrines of preclusion with flexible exceptions that tended to swallow the rule, preclusion would remain unforeseeable.[115] Litigants would still not "package" their suits out of fear of preclusion,[116] while victors would still not have confidence in the finality of judgments.

In fact, the "broad rule-broad exception" formulation is even worse than the "clear limitation-unforeseeable exception to the limitation" model. It calls additional attention to the possibility of invoking unforeseeable preclusion, increasing uncertainty and making judges more likely to use the doctrine. Finally, if preclusion is granted in the second suit, "there will almost surely be an appeal in every case . . . . It would be unfortunate, but not wholly surprising, if whatever judicial economies are achieved . . . at the trial court

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114 For instance, the rule could simply state that all dismissals result in claim preclusion, and that claim preclusion bars both suits against the present defendant and suits against any other potential defendant. Similarly, issue preclusion could apply not only to everything litigated, but also to anything that could have been litigated in the first action. Courts could then refuse to apply these broad rules to any litigant who did not receive a "full and fair" opportunity to litigate the given claim or issue, or whose request to relitigate the claim or issue was "reasonable."

115 If the exception almost invariably swallows the "rule," the prospect of preclusion will be remote. Although the phrasing of the rule will serve as a vague warning that preclusion remains possible, in reality the mere existence of a rarely-used, sweeping "rule" of preclusion is unlikely to affect the litigants' decisions.

116 The phrasing of the "rule" will serve as a warning that will cause the most risk-averse litigants to assume the worst and tailor their conduct to the new "rule." However, because the "rule" will apply only in rare circumstances, litigants in many cases will alter their litigation strategy unnecessarily, causing overlitigation with little corresponding gain.

level prove to be substantially offset by the proliferation of appeals it engenders."[117]

Thus, the formulation of res judicata in terms of clear rules and flexible exceptions is more than a point of legal formalism. Rather, it reflects the need to resist attempts to make preclusion fully inclusive.

III

UNFORESEEABLE PRECLUSION IN THE *SECOND RESTATEMENT*

The previous discussion rested on abstract, theoretical arguments to claim that unforeseeable preclusion is an inherently flawed concept, because it destroys the benefits of res judicata while greatly increasing the costs. An analysis of the cases that have invoked unforeseeable preclusion in ways implied by the *Second Restatement* supports this analysis by revealing uniformly poor results. Consistently, decisions that have invoked preclusion by creating flexible "exceptions to limitations" appear result-oriented. They disregard basic principles of res judicata, cause unnecessary litigation and appeals, and create an unhelpful confusion in the law. The *Second Restatement*'s invitations to unforeseeable preclusion fall into three general categories: expansions of issue preclusion; application of claim preclusion even though the first court lacked authority to adjudicate; and application of claim preclusion despite the intent of the prior court or the parties to the contrary.

The presence of these invitations are not a crushing indictment of the *Second Restatement*. They are subtle, rarely cited, and in several cases, have not been used by courts since the publication of the *Second Restatement* in 1980. On the other hand, they represent more than poor draftsmanship. The language of one provision is quite explicit,[118] and the transcripts of the American Law Institute debates show that certainly one other invitation, and probably all of them, were deliberate[119]—the drafters viewed flexible exceptions to

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117 Holland, *supra* note 9, at 641-42 (discussing the cost of the uncertainty in the application of offensive issue preclusion). For an excellent summary of why broad nets of preclusion are undesirable, see WRIGHT, MILLER & COOPER, *supra* note 1, § 4407, at 51-52.

118 RESTATEMENT (SECOND) OF JUDGMENTS § 28(4) (discussed *infra* part III.A.2.).

119 Comment n to § 20 (then numbered § 48.1) of Tentative Draft No. 1, contained an explicit endorsement of preclusion based on a prior dismissal for lack of authority to adjudicate. In discussing the general rule that a dismissal for lack of ripeness cannot support claim preclusion, comment n formerly stated

> The rule of this Subsection is not an inflexible one. In some instances, it would be plainly unfair to subject the defendant to a second action on the same claim because, for example, all issues in the case were fully litigated in the first proceeding and the precondition the plaintiff did not satisfy could readily have been satisfied in that proceeding, thus avoiding the

limitations as "support[ing] the flexibility that is built into" the

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> burden of additional litigation. Unless the court lacks discretion under the governing statutes or rules of court to determine that a judgment for defendant in such circumstances shall operate as a bar, such a determination in the initial proceedings should be given great weight in any subsequent proceedings.

RESTATEMENT (SECOND) OF JUDGMENTS § 48.1 cmt. n (Tentative Draft No. 1, 1973). It was followed by Illustration 9, which gave the following example:

> A sues B on B's promise of guaranty of a certain debt. After pretrial discovery, and trial of all the issues, the action is dismissed on the ground that A had not made a demand for payment as required by law—a demand that could have been made at any time prior to dismissal. The action is dismissed "with prejudice to any action on the same claim." The judgment is a bar to a second action by A on B's promise of a guaranty brought after a demand is made.

Id. illus. 9.

This illustration was also used to support another invitation to unforeseeable preclusion, in which the *Second Restatement* suggests that courts may sometimes invoke claim preclusion based on a prior dismissal for lack of jurisdiction. RESTATEMENT (SECOND) OF JUDGMENTS, § 48.1 cmt. d (Tentative Draft No. 1, 1973) (currently § 20 cmt. d, discussed *infra* part III.B.1.a.). This section, which ignores the general rule that dismissals for lack of jurisdiction cannot have claim preclusive effects, formerly contained a cross-reference to Illustration 9.

On the floor of the American Law Institute, the Reporters declined to endorse the result in Weissinger v. United States, 423 F.2d 795 (5th Cir. 1970) (en banc) (discussed *infra* note 167), which provided the fact pattern used in Illustration 9 and which the Reporters described as the "primary support" for this concept. 50 A.L.I. PROC. 307 (1974) (statement of Reporter David Shapiro). The reporters also expressed reservations about its result in *Restatement (Second) of Judgments* § 48.1 reporter's note, at 59 (Tentative Draft No. 1, 1973), and on the floor of the American Law Institute. 50 A.L.I. PROC. 307 (1974) (statement of Reporter David Shapiro). However, on the floor, the reporters argued that

> whether or not [that] case itself is correct, [the concept] is a sound one, and it supports the flexibility that is built into [the section discussing dismissals for lack of ripeness]. That is, if a case is fully litigated and after coming to a conclusion is dismissed because the plaintiff has failed to satisfy some condition . . . it is open to the trial judge to make it explicit in his judgment that [the claim is precluded.]

Id.

This notion was rejected by the members on the floor, *id.* at 311-15, and subsequently, comment n was amended and both illustration 9 and the cross-reference in the comment on courts lacking jurisdiction were deleted. Comment n now reads:

> The rule in this subsection is not an inflexible one. In some instances, the doctrines of estoppel or laches could require the conclusion that it would be plainly unfair to subject the defendant to a second action.

RESTATEMENT (SECOND) OF JUDGMENTS § 20 cmt. n (1980). This statement is now unobjectionable because the equitable doctrines mentioned operate outside of res judicata law, which is therefore unaffected. For reasons that are not clear, the reporters amended comment n and deleted the illustration, but did not delete the central proposition that courts without authority to adjudicate can nevertheless preclude a claim.

Interestingly, the drafters accidentally left in a reference to the deleted discussion of *Weissinger* in the Reporter's Note to comment n. *See id.* § 20 reporter's note to subsection (1)(a), at 178.

This episode shows that the drafters of the *Second Restatment* were fully aware of the effect their quiet invitations would have. It therefore clearly demonstrates that the suggestions in the *Second Restatement* that unforeseeable preclusion is sometimes proper rep-

Second Restatment.[120] Further, as shown below, courts are actually creating such exceptions to limitations, and three courts have explicitly read either the *Second Restatement* or one of its Tentative Drafts as inviting these kinds of results.[121] Thus, the presence of these invitations both reflects and influences a pattern of unforeseeable preclusion in the case law.

In each area, there have been a few courts which have reflected the thinking of the *Second Restatement* by announcing novel exceptions to limitations. In all of these cases, the court had a good reason for wishing to avoid a trial. However, none of the applications of preclusion discussed below are justified; they are unwarranted at best and lawless at worst.

A. Issue Preclusion

1. *Issues Not Actually Litigated*

Comment e to section 27 of the *Second Restatement* raises the odd possibility that issue preclusion could be invoked "even if [the issue] was not actually litigated."[122] By allowing the preclusion of issues that were never actually litigated and determined, the *Second Restatement* suggests that the litigant may lose a subsequent claim as a penalty for not raising an issue in a prior suit. This, in effect, gives claim-preclusive effects to issue preclusion.

This provision goes directly against other statements in the *Second Restatement* that recognize a plaintiff may have legitimate reasons

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resent a deliberate policy decision by the Reporters, and are not merely examples of poor draftsmansbip.

120 50 A.L.I. PROC. 307 (1974) (statement of Reporter David Shapiro).

121 Lane v. Sullivan, 900 F.2d 1247 (8th Cir. 1990) (change in the burden of proof) (discussed *infra* note 134 and accompanying text), *cert. denied*, 111 S. Ct. 134 (1990); Dein Host v. Pignato, 86 B.R. 318 (D.N.H. 1988) (issues not actually litigated) (discussed *infra* note 130); Stebbins v. Nationwide Mut. Ins., 528 F.2d 934 (4th Cir. 1975) (dismissals for lack of ripeness—tentative draft), *cert. denied*, 424 U.S. 946 (1976) (discussed *infra* note 167).

122 Section 27 comment e states:

> It is true that it is sometimes difficult to determine whether an issue was actually litigated; even if it was not litigated, *the party's reasons for not litigating in the prior action may be such that preclusion would be appropriate.* But the policy considerations . . . weigh strongly in favor of nonpreclusion, and it is in the interest of predictability and simplicity for such a result to obtain uniformly. [emphasis added].

RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. e.

Arguably, this provision is not an exception to a limitation, as are the other provisions discussed in this Note, but rather is an alternative phrasing of the rule itself. Thus, issue preclusion could be viewed in two ways. First, it could be viewed as precluding an issue that was determined and was either litigated or unreasonably not litigated. Alternatively, it could be viewed as precluding an issue that was already determined—limited to cases actually litigated—except if the decision not to litigate the issue was unreasonable. However, which view is adopted is unimportant, because, in either case, this is a vague provision that leads to unforeseeable preclusion.

for not litigating an issue,[123] and that caution against mixing issue preclusion and claim preclusion.[124] In addition, the *Second Restatement* itself cautions that precluding issues not actually litigated is likely to be inefficient, because it may cause overlitigation.[125]

Because this notion contradicts so many accepted tenets of res judicata, it is tempting to try to avoid this odd policy by interpreting the *Second Restatement* to say something more reasonable. For instance, some may see this statement as merely a clumsy way of pointing out that it may, at times, be difficult to determine when an issue was "actually litigated," and that, therefore, a court should employ a pragmatic definition of "actually litigated." Such a definition might, for example, preclude issues that were raised by the pleadings but not actually discussed at trial. A party may be substantially prejudiced by such practices if she has devoted extensive time and money to preparing to litigate the issue in the first trial.[126]

This consideration, however, is adequately addressed in the *Second Restatement*'s definition of "actually litigated," which declares that an issue is litigated when it is "properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined."[127] Further, the statement that preclusion might apply to an issue "even if it was not actually litigated"[128] makes clear that this is not part of the *Second Restatement*'s flexible definition of "actually litigated." Thus, while the doctrine is a narrow one, and while the drafters state that "the policy considerations . . . weigh strongly in favor of nonpreclusion,"[129] at least one court has explicitly acknowl-

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123 "The action may involve so small an amount that litigation of the issue may cost more than the value of the lawsuit. Or the forum may be an inconvenient one in which to produce the necessary evidence or in which to litigate at all. . . ." RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. e (1980).

124 *Restatement (Second) of Judgments*, Title E, introductory note, states:

> Courts laboring under a narrow view of the dimensions of a claim may on occasion have expanded concepts of issue preclusion in order to avoid relitigation of what is essentially the same dispute. Under a transaction approach to the concept of a claim, on the other hand, there is less need to rely on issue preclusion to put an end to the litigation of a particular controversy.

Id. at 250.

125 "[I]f preclusive effect were given to issues not litigated, the result might serve to discourage compromise, to decrease the likelihood that issues in an action would be narrowed by stipulation, and thus to intensify litigation." RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. e.

126 *See* WRIGHT, MILLER & COOPER, *supra* note 1, § 4419, at 180.

127 "When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated within the meaning of this Section." RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. d. This is an appropriately broad statement, and is supported by Wright, Miller, and Cooper. WRIGHT, MILLER & COOPER, *supra* note 1, § 4419, at 178-81.

128 RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. e.

129 *Id.*

edged that this is an invitation to preclude issues that have never been adjudicated.[130] At least one court has accepted the invitation and created a trap for the unwary that was both unjust and, fortunately, short lived.[131]

It is thus difficult to understand why the drafters of the *Second Restatement* introduced flexibility into the generally accepted doctrine that issue preclusion applies only to matters that are actually litigated and determined. While the problem will perhaps arise in few situations, there is no principled reason why the problem should exist at all.

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130 *See* Dein Host v. Pignato, 86 B.R. 318 (D.N.H. 1988) (recognizing the possibility of precluding issues raised in a default judgment based on this section of the *Second Restatement*, but declining to do so).

131 Palma v. Powers, 295 F. Supp. 924 (D. Ill. 1969). The case involved a § 1983 action seeking damages for an allegedly illegal search and seizure. The court held that the plaintiff's failure at a prior criminal trial to challenge the admissibility of the evidence seized constituted a binding admission that the search was proper. This decision was all the more remarkable because not until 11 years later did the Supreme Court, in a subsequent § 1983 case, approve of precluding issues determined at a suppression hearing. Allen v. McCurry, 449 U.S. 90 (1980). Furthermore, the court's action turned what later became the *Allen* rule into a cruel hoax that ensured that a criminal defendant would never be assured of having a federal forum to challenge the introduction of illegally seized evidence. If the defendant seeks to have the evidence suppressed and loses, the issue is precluded in a subsequent § 1983 case. If the defendant does not seek to have the evidence suppressed, he is barred by the *Palma* rule. Fortunately, the Court of Appeals for the circuit where this doctrine arose has described the idea as "soundly criticized," Whitley v. Seibel, 676 F.2d 245, 249 n.8 (7th Cir.), *cert. denied*, 459 U.S. 942 (1982), and Wright, Miller, and Cooper have suggested that it is dead. WRIGHT, MILLER & COOPER, *supra* note 1, § 4419 n.9, at 123 (Supp. 1990).

Wright, Miller, and Cooper suggest that courts can legitimately preclude unlitigated issues when a party to an ongoing relationship fails to litigate an issue and the other party relies on the judgment in making long-range plans. For instance, if a tenant is sued for unpaid rent, and he defends solely on the ground that the rent is paid, the landlord will rely on a favorable judgment in not searching for a new tenant. If the tenant were to successfully defend a subsequent suit for unpaid rent on the ground that the lease was never validly signed, the inconsistent result would betray the landlord's reliance on his prior victory. (This example is suggested by Jacobson v. Miller, 1 N.W. 1013 (Mich. 1879), discussed in WRIGHT, MILLER & COOPER, *supra* note 1, § 4414, at 119-20.) This concern has led Wright, Miller, and Cooper to suggest that a variant of claim preclusion, which they call "defense preclusion," should exist when "allowing the new defense threatens direct or potential reliance interests of the plaintiff." *Id.* at 119.

However, it is impossible that the authors of the *Second Restatement* had defendant preclusion in mind in drafting comment e, because they specifically disclaim intent to pursue the issue. The Second Restatement states:

> It should be noted that, although issue preclusion does not apply to issues not actually litigated, there is a concept of estoppel in pais, not dealt with in this Restatement, which may be applicable in appropriate cases. Under this concept, a person who makes a representation may be estopped to deny its truth if the person to whom it was made has changed his position in reliance.

RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. e. By its terms, this statement would cover a situation described above, in which the defendant admitted the contract was valid in the first case, and denied its validity in the second.

2. *Changes in the Standard of Proof*

If the door is opened just a crack regarding issues that were not actually litigated, it is flung wide open by the *Second Restatement*'s assertion that "there may be many occasions" when preclusion should apply against a party who faces a decreased standard of proof in the second suit. This notion disregards the established limitation on issue preclusion that a party can relitigate an issue previously litigated and determined if that party's burden of proof in the second suit is lighter than it was in the first.[132]

Consider a party who, with the assistance of his attorney, negotiates a contract that laters proves unfavorable. If he claims that, without his knowledge, a term in the contract was fraudulently changed by the other party, in many jurisdictions he will have to prove his case by clear and convincing evidence.[133] If he loses that suit, he can still sue his lawyer for malpractice for failing to inform

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132 Section 28(4) states that issue preclusion should not apply if:

> [T]he party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action.

RESTATEMENT (SECOND) OF JUDGMENTS § 28(4). However, comment f to that section argues:

> To apply issue preclusion in the cases described . . . would be to hold, in effect, that the losing party in the first action would also have lost had a significantly different burden been imposed. *While there may be many occasions when such a holding would be correct*, there are many others in which the allocation and weight of the burden of persuasion . . . are critical in determining who should prevail.

RESTATEMENT (SECOND) OF JUDGMENTS § 28 cmt. f (emphasis added).

The losing party in the first action could have had a heavier burden of proof in the prior case either a) if she is the plaintiff and, after failing to prove matters by a clear and convincing evidence now seeks to prove the issue by a preponderance of the evidence, or b) if she is the defendant and, after her opponent proved her case by a preponderance of the evidence, the opponent now must prove the issue by clear and convincing evidence.

Section 28(4) would also prevent preclusion when the burden of establishing a prima facie case rested on one party in the first case, but rests on the other in the second. For example, when the precluded party put forth no evidence in the first proceeding based upon an erroneous belief that its opponent failed to make out a prima facie case and subsequently lost the case, § 28(a) would allow the party to relitigate the issues in the second case. It is at least arguable, however, that many times the issue is so closely contested throughout the suit that the litigants and the finder of fact rapidly lose track of which party had the burden of proof, which suggests that the placement of the burden of proof can be ignored. Nevertheless, the *Second Restatement* clearly does not suggest that this is proper, since it specifically disapproves of a case that makes that argument. Harding v. Carr, 83 A.2d 79 (R.I. 1951), *disapproved in* RESTATEMENT (SECOND) OF JUDGMENTS § 28 reporter's note, at 289. In light of the repudiation of this case, it is even more curious that the *Second Restatement* invites more cases along these lines.

133 *See* Addington v. Texas, 441 U.S. 418, 424 (1979) ("One typical use of the [clear and convincing] standard is in civil cases involving allegations of fraud . . . .").

him of the new terms, because in this latter suit he will only have to prove his case by a preponderance of the evidence.[134] Two circuit courts, however, have accepted the *Second Restatement*'s suggestion that issue preclusion may apply despite a decrease in the precluded party's burden of proof if the rendering court specifically states that the precluded party failed to meet the lower burden in the original case.[135]

While courts may understandably wisb to avoid a trial that will consider the same evidence presented to a prior jury, invoking preclusion in these circumstances violates accepted res judicata principles on two fundamental levels.[136] First, a change in the burden of proof alters the suit sufficiently that the issue, whether a preponderance of the evidence indicates that fact *A* is true, is different from the issue decided previously, whether there is clear and convincing evidence that fact *A* is true. While a finding that there is clear and convincing evidence necessarily implies that there is a preponderance, the existence of a preponderance of the evidence by no means implies tbat the evidence is clear and convincing. Thus, the losing party did not have a full and fair opportunity to litigate the question of the lesser burden of proof, because her tactics may have been different had she known the lesser burden of proof was also in issue.[137] Further, under the rules of preclusion, a litigant is allowed

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134 This example is based on the facts in Lane v. Sullivan, 900 F.2d 1247 (8th Cir.), *cert. denied*, 111 S. Ct. 134 (1990). This tactic would usually not work if both suits involved the same defendant because claim preclusion would apply.

135 The cases are Marlene Indus. v. NLRB, 712 F.2d 1011 (6th Cir. 1983) and *Lane*, 900 F.2d 1247. In *Marlene Industries*, the NLRB initially sought to hold the company in contempt for violating an earlier injunction against unfair labor practices. This suit, which required a demonstration of a violation by clear and convincing evidence, failed. *Marlene Indus.*, 712 F.2d at 1014. When the NLRB sought a new injunction, which required only a preponderance of the evidence, the claim was denied on res judicata grounds because the judge in the prior proceeding had expressly stated that the incident in question was not an unfair labor practice and therefore, that the lower burden was not met. *Id.* at 1017. While the Sixth Circuit did not specifically refer to the § 28(a) comment in question, it did refer to § 28(4). *Id.* at 1015. The court's explicit reference to § 28(4) and its invocation of this preclusion-burden of proof doctrine clearly indicates that the court was influenced by the invitation.

Additionally, one would ordinarily expect the NLRB's second suit in *Marlene Industries* to be barred by claim preclusion. Some sort of exception must apply because of the specialized nature of an NLRB enforcement proceeding.

136 Unlike the other doctrines considered in this Note, this doctrine arguably increases accuracy, at least under these narrow circumstances, by preventing litigants from obtaining two chances to recover through first filing the suit in which clear and convincing evidence is required, and then suing again when a preponderance of the evidence will do. *See supra* note 91. Were it not for the altered burden of proof, conventional mutual and defensive nonmutual issue preclusion would prevent the use of this tactic, as they do in most litigation.

137 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28(5); Metcalfe Bros. v. American Mut. Liab. Ins. Co., 484 F. Supp. 826, 830 (W.D. Va 1980).

to withhold the issue of the lesser burden of proof without fear of preclusion[138]—the splitting may have been a legitimate choice based on "the irrational tactical realities that often counsel freedom for litigants to choose whether it is better to forego the possibility of a single comprehensive suit."[139]

Second, any determination by the prior court that the lesser burden of proof was also not met is mere dicta. It is too unreliable to form the basis of preclusion both because it is not essential to the judgment[140] and because it can not be appealed.[141]

A small empirical study in this area of res judicata since the Sixth Circuit first allowed preclusion, despite a change in the burden of proof in 1983,[142] provides a clear example of the problems that can result from unforeseeable preclusion. Although the preclusion-burden of proof issue is discussed in only one reported case from an Article III court in all the years prior to that first case in 1983,[143] it has appeared in 11 reported Article III decisions in the 9 years since, 9 of which were appellate, with preclusion being granted in only 3 of them.[144] Using a conservative 90% settlement

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138 Claim preclusion is not in issue here, because under the black letter law, a plaintiff has a separate claim against every potential defendant. RESTATEMENT (SECOND) OF JUDGMENTS § 50 (1980); WRIGHT, MILLER & COOPER, *supra* note 1, § 4407, at 52-53.

139 WRIGHT, MILLER & COOPER, *supra* note 1, § 4403, at 22.

140 "It is only human nature for a trier of fact or law to gloss over a matter that he determines to relate only superficially to the final decision." *Metcalfe Bros.*, 484 F. Supp. at 830.

141 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28(1).

142 Marlene Indus. v. NLRB, 712 F.2d 1011 (6th Cir. 1983). *See supra* note 135.

143 Azalea Drive-In Theatre v. Hanft, 540 F.2d 713 (4th Cir. 1976), *cert. denied*, 430 U.S. 941 (1977). In addition, the issue was addressed in two Article I courts: North Cent. Wool Mktg. Corp. v. Carothers (*In re* Carothers), 22 B.R. 114 (Bankr. D. Minn. 1982) and Manning v. Iannelli (*In re* Iannelli), 12 B.R. 561 (Bankr. S.D.N.Y. 1981). All three denied the motions for collateral estoppel.

144 Court of appeals cases: Lane v. Sullivan, 900 F.2d 1247 (8th Cir.) (applying preclusion), *cert. denied*, 111 S. Ct. 134 (1990); U.S. Aluminum v. Alumax, 831 F.2d 878 (9th Cir. 1987) (denying preclusion), *cert. denied*, 488 U.S. 822 (1988); Wilcox v. First Interstate Bank of Or., 815 F.2d 522 (9th Cir. 1987) (denying preclusion).

District court cases hearing bankruptcy appeals: McHenry v. Ward (*In re* Ward), 115 B.R. 532 (W.D. Mich. 1990) (denying preclusion); Nelson v. Tsamasfyros (*In re* Tsamasfyros), 114 B.R. 721 (D. Colo. 1990) (applying preclusion); Hoskins v. Yanks (*In re* Yanks), 100 B.R. 595 (S.D. Fla. 1989) (denying preclusion); *In re* Henderson, 96 B.R. 63 (Bankr. E.D. La. 1989) (denying preclusion); Laganella v. Braen (*In re* Braen), 94 B.R. 35 (D.N.J. 1988) (denying preclusion); Boston v. Overmyer (*In re* Overmyer), 52 B.R. 111 (S.D.N.Y. 1985) (applying preclusion).

District courts as trial courts: Wilson v. Chicago, 707 F. Supp. 379 (N.D. Ill. 1989) (denying preclusion); O'Neill v. Merrill Lynch, 654 F. Supp. 347 (N.D. Ill. 1987) (denying preclusion).

In addition, the issue has arisen in the following Article I bankruptcy court cases: Jerry Katzman, M.D. Opthalmic Assoc., P.A. v. Owens (*In re* Owens), 123 B.R. 434 (Bankr. M.D. Fla. 1991) (denying preclusion); Guimond v. Guimond (*In re* Guimond), 122 B.R. 170 (Bankr. D.R.I. 1990) (denying preclusion); Krenawsky v. Haining (*In re* Haining), 119 B.R. 460 (Bankr. D. Del. 1990) (denying preclusion); Johnson v. Miera (*In*

rate,[145] this represents the avoidance of 0.3 trials. It is therefore easy to see how the development of an unnecessary exception to a limitation can cause far more litigation than it saves. In any case, further litigation over this questionable doctrine in federal court is unlikely, because the Supreme Court flatly rejected the doctrine in recent dicta.[146]

B. Claim Preclusion

1. *Courts Lacking Authority to Adjudicate*

a. *Lack of Jurisdiction*

The *Second Restatement* twice suggests that a court lacking authority to adjudicate could nevertheless preclude a claim. In the first such passage, the authors state that a dismissal for lack of jurisdiction, improper venue, or nonjoinder or misjoinder of a party "*ordinarily*" could not preclude a subsequent suit after the problem had been cured.[147] This phrase invites the strange conclusion that in some cases a court that has no jurisdiction over a controversy nevertheless has jurisdiction to enter what amounts to a judgment for the

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re Miera), 104 B.R. 150 (Bankr. D. Minn. 1989) (denying preclusion); Quality Pools v. Lichter (*In re* Lichter), 104 B.R. 521 (Bankr. M.D. Ga. 1989) (denying preclusion).

Since this footnote argues that the uncertainty in res judicata law caused this proliferation of appeals, the cases were screened to ensure these opinions would not have been necessary without one party seeming to exploit the *Second Restatement*'s invitation to unforeseeable preclusion. Thus, the matter was also litigated in many bankruptcy court decisions and appeals therefrom that are not reflected above because there was uncertainty as to the standard of proof that applied in either the bankruptcy court or in the prior trial court. These bankruptcy cases involved instances where there was clear circuit precedent on the standard of proof, so the appeal was clearly based on a desire to invoke collateral estoppel despite the change in the level of proof required.

Bankruptcy cases are numerous because, prior to the Supreme Court's recent decision in Grogan v. Garuer, 111 S. Ct. 654 (1991), many circuits had held that the standard of proof in bankruptcy discharge cases was clear and convincing evidence. The preclusion issue arose frequently as litigants attempted to use issue preclusion from state judgments decided on a preponderance of evidence. *Grogan*, however, resolved the conflict in the circuits in favor of a preponderance of the evidence standard. *Id.* at 659.

145 *See supra* note 52.

146 The Supreme Court granted that a prior judgment on a preponderance of the evidence would support issue preclusion in bankruptcy court if the bankruptcy judge applied the preponderance of the evidence standard. The Court continued in dicta, though, that "[i]f, however, the clear-and-convincing standard applies [in bankruptcy court] . . . [a] prior judgment [based on a preponderance of the evidence] could not be given collateral estoppel effect." *Grogan*, 111 S. Ct. at 658. Ironically, the Supreme Court cited § 28(4) of the *Second Restatement* to support this conclusion. *Id.* While this statement arose in the context of bankruptcy litigation, nothing in the statement indicated an intention to limit it to that context.

147 Section 20 comment d states that "a dismissal [for lack of jurisdiction, improper venue, or nonjoinder or misjoinder of a party] is so plainly based on a threshold determination that a specification that the dismissal will be a bar should *ordinarily* be of no effect." (emphasis added).

defendants.[148] Similarly, a case dismissed for nonjoinder, misjoinder, or improper venue is never properly before the court, leaving it without authority to adjudicate. The *Second Restatement*, however, would deem that the court somehow obtains such authority.

The problems with this "exception to a limitation" are reflected in *Mattson v. City of Costa Mesa*,[149] a California state court decision that applied claim preclusion to state claims over which the federal court declined to exercise pendent jurisdiction. On the surface, the decision seems wise. The plaintiff had sued originally in federal court on a tenuous section 1983 action and sought to include equally tenuous pendent state claims.[150] When the federal court declined to exercise pendent jurisdiction over the state claims, the plaintiff decided to continue his section 1983 case in federal court and subsequently pursue the related state-law claims in state court.[151] After a jury returned a general verdict against the plaintiff and the federal court fined him under Rule 11 for bringing a frivolous claim,[152] it was understandable that the California court did not want to revisit this highly questionable claim.

Unfortunately, standard res judicata doctrines were not available. The proper means for precluding relitigation of similar facts is issue preclusion, which the state court found inapplicable here because the federal claims were sufficiently different from the state law claim.[153] Further, the court went on to find, based in large part on the tentative draft to the *Second Restatement*, that a plaintiff may legiti-

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148 This statement is all the more curious in view of the statement found later in the § 20 comment that "the judgment should not operate as a bar if one of [two alternative] determinations is that the court in which the action was brought lacked subject matter or personal jurisdiction to adjudicate the claim." RESTATEMENT (SECOND) OF JUDGMENTS § 20 cmt. e.

Of course, there is a well-established doctrine that a court without jurisdiction could render a decision on the merits, with preclusive effect, if it erroneously concluded that it has jurisdiction. This rests on the principle that a court's determination of its own jurisdiction is itself res judicata. Durfee v. Duke, 375 U.S. 106, 111 (1963). However, the *Second Restatement* is not discussing that situation, since it refers to cases dismissed for lack of jurisdiction.

Similarly, a court that has not yet determined whether or not it has jurisdiction could possibly dismiss with prejudice because of the plaintiff's failure to obey an order of the court. However, this is an extremely clear and well-established doctrine. *See* FED. R. CIV. P. 41(b). While it may be construed as an exception to a limitation, the doctrine is completely foreseeable.

149 164 Cal. Rptr. 913 (Cal. Ct. App. 1980).

150 *Id.* at 915.

151 *Id.*

152 *Id.*

153 Specifically, the California court found that the § 1983 action, which sought to prove an assault by state officers, required the plaintiff to prove that the injuries were intentionally inflicted. *Id.* at 916. Since there was no such mens rea element in the state claim, and since mens rea could have been the basis of the jury verdict, issue preclusion was unavailable. *Id.*

mately split his claim when he sues in federal court and the federal court declines to exercise pendent jurisdiction.[154] At this point, inquiry into preclusion should have ceased. Instead, the court then announced the surprising doctrine that, while the plaintiff acted properly in going to federal court in the first instance, he waived his right to pursue the state law claims when he proceeded to trial after the court declined to exercise pendent jurisdiction.[155]

The court's result is highly questionable in several respects. First, the California court's insistence that the plaintiff seek a voluntary dismissal as to his state claims was highly impractical. The federal court did not rule on the question of pendent jurisdiction until nine months after the suit was filed, well after the time when he could have elected a dismissal without prejudice as a matter of right.[156] Second, the rule is so novel and counterintuitive that it functions entirely as a trap for the unwary.[157] Third, the doctrine ignores the federal policy of providing a federal forum to hear federal questions—a key purpose in the original enactment of section 1983.[158] By stripping the plaintiff of his state claim as a price for exercising his right to a federal forum for his section 1983 claims, the court violates the Supremacy Clause, which "secures federal rights by according them priority when they come into conflict with state law."[159] Finally, if there is a villain in this suit who may fairly be charged with wasting judicial resources, it is the federal judge,

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154 While comment e to [§ 25] . . . does not expressly deal with the situation where the plaintiff has attempted to have the federal court exercise pendent jurisdiction and the federal court has refused to do so, it is fairly plain from the comment . . . that the authors of the Restatement Second would conclude that a subsequent state court action is not barred.

Id. at 921. This position is supported by WRIGHT, MILLER & COOPER, *supra* note 1, § 4412, at 96.

155 Mattson v. City of Costa Mesa, 164 Cal. Rptr. 913, 921-22 (Cal. Ct. App. 1980).

156 Under Rule 41(a), a plaintiff may dismiss as a matter of right "at any time before service by the adverse party of an answer or of a motion for summary judgment." FED. R. CIV. P. 41(a). Because the answer must be served within 20 days, FED. R. CIV. P. 12(a), the time for voluntary dismissal had long since passed.

157 After all, the notion that a court that lacks jurisdiction could nevertheless assume the power to preclude a claim is almost a contradiction in terms. Wright, Miller, and Cooper argue that "[n]o apparent reason exists to justify forfeiture of the underlying claims upon a mistaken choice of tribunal . . . . [A] court that orders dismissal on these grounds should not have *any* discretion to direct that the dismissal will preclude a second action on the same claim." WRIGHT, MILLER & COOPER, *supra* note 1, § 4436, at 347 (emphasis added).

158 *See* Allen v. McCurry, 449 U.S. 90, 108-09 (Blackmun, J., dissenting).

159 Dennis v. Higgins, 111 S. Ct. 865, 872 (1991).

who could have disposed of the state law claims with minimal effort by exercising pendent jurisdiction[160] or by using a special verdict.[161]

b. *Unripe Claims*

In the same section, the *Second Restatement* raises the similarly startling possibility that a court could invoke claim preclusion based on a prior dismissal for lack of ripeness.[162] This notion that courts

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160 The federal court clearly had discretion to exert pendent jurisdiction. Under Bell v. Hood, 327 U.S. 678 (1946), the federal court has jurisdiction so long as the complaint "is drawn so as to claim a right to recover under the Constitution and laws of the United States." *Id.* at 681. The federal complaint clearly met that standard by alleging an intentional assault. While Bell also states that "a suit *may* sometimes be dismissed for want of jurisdiction where the alleged [federal claim] . . . is wholly insubstantial and frivolous," *id.* at 682-83 (emphasis added), as was the case here, this statement is phrased in discretionary terms. Indeed, the importance of exerting pendent jurisdiction in these situations was emphasized in United Mine Workers v. Gibbs, 383 U.S. 715 (1966), in which the Supreme Court urged district judges to look to "considerations of judicial economy, convenience and fairness," *id.* at 726, in deciding whether to exercise pendent jurisdiction. Subsequent events proved that these factors weighed strongly in favor of pendent jurisdiction in this case.

161 Had the judge used a special verdict, it might have revealed that the jury found that the alleged assault never occurred, and therefore did not reach the question of the state officials' intent. This information would have allowed the use of issue preclusion and would have barred the second suit.

162 Section 20 comments k and l of the *Second Restatement* state:

> k. A determination by the court that the plaintiff has no enforceable claim because the action is premature, or because he has failed to satisfy a precondition to suit, is not a determination that he may not have an enforceable claim thereafter, and does not *normally* preclude him from maintaining an action when the claim has become enforceable. . . . [emphasis added]
>
> The rule stated [above] is applicable whether the fact that the action is premature, or that a precondition has not been satisfied, appears on the face of the pleadings, as a result of pretrial discovery, or from the evidence at trial.
>
> *l.* The rule stated [above] is applicable to a case in which the time for performance had not arrived when the plaintiff brought the action.

This concept is later specifically repeated in the context of contracts. Section 26 comment g of the *Second Restatement* states:

> A judgment in an action for breach of contract does not *normally* preclude the plaintiff from thereafter maintaining an action for breaches of the same contract that consist of failure to render performance due after commencement of the first action. [emphasis added]

One can argue that the *Second Restatement*'s suggestion that claim preclusion might sometimes apply to unripe claims merely represents the narrow and familiar rule that all claims mature immediately when a contract has been repudiated, even if the time for performance is still in the future. For example, comment g goes on to state:

> But if the initial breach is accompanied or followed by a "repudiation," . . . and the plaintiff thereafter commences an action for damages, he is obliged in order to avoid "splitting," to claim all his damages with respect to the contract, prospective as well as past, and the judgment in the action precludes any further action by the plaintiff for damages arising from the contract.

However, that narrow interpretation is a tortured one. First, the presence of the "normally" language in § 20 comment k as well as § 26 comment g explicitly suggests

can preclude unripe claims has precedent in two areas of law, neither of which is sound. The first involves claims against the government, in which plaintiffs lose claims that arise after the initiation of the suit because of their failure to amend the pleadings to include these late-maturing claims. This doctrine has been applied both by a district court[163] and by the Court of Claims.[164] While this doctrine

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that an exception allowing preclusion for lack of ripeness extends beyond contract, particularly in light of the express statement in comment l that comment k applies to matters involving future obligation. Second, comment k says that preclusion does not "normally" apply if the claim is "premature." This formulation cannot anticipate an exception for contract cases involving a repudiation, which justify preclusion precisely because the entire claim has matured. Third, if the reporters of the *Second Restatement* had intended to limit the doctrine to repudiation, they could have stated flatly that preclusion does not apply unless a repudiation has occurred. Thus, it seems clear that the authors of the *Second Restatement* intended to repeat their general views on ripeness in the specific context of contracts.

163 Nernberg v. United States, 463 F. Supp. 752 (W.D. Pa. 1979), *aff'd without published opinion*, 612 F.2d 574 (3d Cir. 1979). This case involved a claim under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b) (1988), for medical malpractice. The plaintiff had previously sued under the Tucker Act, 28 U.S.C. § 1346(a)(2) (1988), but lost on summary judgment. *Nernberg*, 463 F. Supp. at 753. At the time, however, he had not exhausted his administrative remedies under the FTCA, and thus could not join the two suits. *Id.* at 753-54.

Nevertheless, the district judge applied claim preclusion to the FTCA suit. The court reasoned that, had the plaintiff alerted the court to the possibility of joining an alternative theory of relief, the court would have delayed disposition of the case until the FTCA claims could be joined. *Id.* at 754. However, the opinion is openly ad hoc, arguing frankly "[w]e do not believe that the failure of the Plaintiffs to exhaust their administrative remedies by the time the first lawsuit was filed should allow them to burden the judicial system with a second lawsuit based upon precisely the same conduct of the Defendant." *Id.*

The hole in the court's theory is that no rule requires the plaintiffs to do what the court suggests. It is thus patently unfair for the court to preclude them from arguing a claim that may have merit. Further, if it is true, as the court states, that the change in statutory authority is the "only . . . difference between the prior lawsuit and the instant one," *id.* at 753, the doctrine of issue preclusion will usually dispose of the matter. It is not clear why the court did not rely on issue preclusion in this opinion, but one suspects that the grounds for summary judgment in the Tucker Act action were not fatal to the FTCA claim (the prior decision is unreported).

The court's reliance on conservation of judicial resources is also questionable. The first suit was disposed of on summary judgment, so the suit could not have consumed an excess of judicial resources. The second suit was also brought a few months after dismissal of the original suit, so the time the government spent preparing for the first case would presumably be applicable to the second. Finally, the judge also found in the alternative, in two sentences at the end of the opinion, that the FTCA did not apply to the case at bar. *Id.* at 754. This alternative holding renders this questionable expansion of claim preclusion wholly unnecessary and undermines the court's claim that failure to preclude the second suit would "burden the judicial system." *Id.*

164 In Electric Boat Co. v. United States, 81 Ct. Cl. 361, 367-68 (Ct. Cl. 1935), *cert. denied*, 297 U.S. 710 (1936), the Court of Claims held that a litigant who brings suit against the government must continually amend his suit to add any claims that arise under the contract during the pendency of the suit. This holding runs directly contrary to black letter law, *see, e.g.*, WRIGHT, MILLER & COOPER, *supra* note 1, § 4409, at 76-77; RESTATEMENT OF JUDGMENTS § 62 cmt. b (1942), and is not discussed or supported by

may be desirable on efficiency grounds,[165] that does not excuse selectively applying it in extremely rare instances,[166] when it necessarily functions as an unforeseeable trap. In any event, issue preclusion will prevent excessive relitigation in such cases.

Courts have also applied claim preclusion to cases dismissed as unripe when the lack of ripeness is discovered only after a full trial on the merits.[167] It is easy to sympathize with the judges in these

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any aspect of the Federal Rules. It thus functions almost entirely as a trap for the unwary.

165 If a litigant knows that future claims will arise, it makes sense to require him to move for declaratory judgment. While issue preclusion will often streamline subsequent litigation, minor variations in the law or the circumstances may render issue preclusion inapplicable, or may require a separate calculation of damages. However, most litigants will combine their claims of their own accord, because doing so will reduce their attorney's fees.

166 Neither of these cases have been followed. Only one court has cited the *Nernberg* exposition on claim preclusion, and that court declined to follow the precedent. Ludwig v. Quebecor Dailies, Inc., 483 F. Supp. 594, 596 n.4 (E.D. Pa. 1980). *Electric Boat*, decided over 55 years ago, is also a legal orphan. The only case subsequently citing it, Everett Plywood Corp. v. United States, 512 F.2d 1082 (Ct. Cl. 1975), recognized this doctrine in dicta as binding precedent but declined to expand it. *Id.* at 1087.

167 In Weissinger v. United States, 423 F.2d 782 (5th Cir. 1968), the government had sued the defendant to collect a debt that was payable "immediately . . . upon written demand." Three months before trial, the defendant amended her answer to include the government's failure to demand payment as a defense. After a full trial on the merits, the district court explicitly rejected ten defenses proffered by the defense, but ruled for the defense on the ripeness issue and dismissed the suit "with prejudice." When the government demanded payment and sought to sue again, the Fifth Circuit ruled en banc that claim preclusion should apply. Weissinger v. United States, 423 F.2d 795 (5th Cir. 1970) (en banc). This case was disposed of in an opinion focusing on Rule 41(b) and on Costello v. United States, 365 U.S. 265 (1961), which held that despite the wording of Rule 41(b), a dismissal for lack of ripeness was without prejudice. Nevertheless, Wright, Miller, and Cooper properly state that the opinion "leave[s] the question hanging," and focus instead on the extent of the negligence of the plaintiff in failing to meet the ripeness requirement. WRIGHT, MILLER & COOPER, *supra* note 1, § 4435, at 338. *Weissinger* was the inspiration for this provision in the *Second Restatement*. *See supra* note 119.

In Stebbins v. Nationwide Mut. Ins., 528 F.2d 934 (4th Cir. 1975), *cert. denied*, 424 U.S. 946 (1976), the plaintiff had filed a string of suits and EEOC complaints against the defendant. *Id.* at 936. The Fourth Circuit had affirmed the dismissal of the most recent suit solely on the ground that the suit was unripe becanse the plaintiff lacked a valid EEOC "right to sue" letter. The plaintiff promptly filed a new suit which the trial court dismissed, finding that the dismissal of the prior suit on ripeness grounds precluded the latter claim. *Id.* at 937. Citing both Weissinger and the Tentative Draft of the *Second Restatement*, *see supra* note 119, the Fourth Circuit agreed. The court focused both on the burden that the second suit placed on the defendant, and that this burden was caused by plaintiff's "intentional disregard of the statutory precondition." *Id.* at 938. Given the plaintiffs persistence in filing related unsuccessful claims, the Fourth Circuit's eagerness to be rid of the case is not surprising.

Both of these cases are discussed extensively in John E. Eichhorst, Note, *Res Judicata Effects of Involuntary Dismissals*, 70 CORNELL L. REV. 667 (1985). *Weissinger* has been the focus of several notes: Neil J. Orleans, Note, 49 TEX. L. REV. 372 (1971); Ira J. Smotherman, Comment, *Federal Rules of Civil Procedure—Rule 41(B)—Res Judicata Effect of Involuntary Dismissal With Prejudice*, 19 J. PUB. L. 423 (1970); Note, *Rule 41(b), Federal Rules*

cases.[168] After a full trial on the merits, the courts find that they cannot give judgment because of a ripeness problem. Worse, because any conclusions on the issues in the suit will not be essential to the judgment, issue preclusion also will not prevent relitigation of the entire case. It is thus understandable that judges in these cases do not look favorably on the plaintiffs whose negligence caused these problems. Accordingly, one commentator has defended the use of claim preclusion in these situations, arguing that courts should apply preclusion when three conditions are met: "First, the defendant must have undergone substantial preparation to meet the merits. Second, the plaintiff must have been able to avoid the need for such preparation by exercising reasonable measures. Third, the defendant must not have intentionally waived the maturity or precondition required."[169] A similar standard was proposed in an early draft of the *Second Restatement*,[170] but was eliminated at the 1973 American Law Institute meeting.[171]

The problem with these proposals, and with the cases that inspired them, is that they seek to use res judicata to serve a purpose it is ill-adapted to serve—to exact retribution and restitution from a litigant whose negligence wasted the resources of both the court and the parties.[172] When courts use res judicata to compensate a litigant's opponent for expending unnecessary legal expenses, the amount of the compensation (the value of the claim) is unrelated to the scope of the injury (the unnecessary legal expenses). Indeed, res judicata may strip a litigant of a claim worth tens or hundreds of times more than the unnecessary expenses caused by his negligence.[173] Rule 11, not res judicata, properly serves this purpose by

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of Civil Procedure—Is a Specifying Dismissal Order Unimpeachable? Weissinger v. United States, 31 MD. L. REV. 85 (1971).

168 It is more difficult to sympathize with the defendants, because they were equally able to point out the obvious ripeness problem at an early stage in the proceeding, and thereby avoid the expense of a wasted trial. *See* 50 A.L.I. PROC. 311-12 (1974) (statement of Judge Leventhal) (arguing in a similar hypothetical that the defendant was equally at fault).

169 Eichhorst, Note, *supra* note 167, at 690. On the basis of this suggestion, the author approved of *Stebbins*. *Id.* at 693.

170 This standard would have allowed claim preclusion when "the circumstances are such that it would be manifestly unfair to subject the defendant to [a second] action." RESTATEMENT (SECOND) OF JUDGMENTS § 48.1(2) cmt. n (Tentative Draft No. 1, 1973).

171 An extensive discussion of the circumstances surrounding the deletion of this provision appears in Eichhorst, Note, *supra* note 167, at 688-90, and *supra* note 119.

172 The efficiency aspect of res judicata is designed to prevent future unnecessary legal fees, not to exact retribution or restitution for past negligent practices. Even the punitive aspects of claim preclusion, *see supra* notes 63-67 and accompanying text, exist as a deterrent, not as retribution or restitution.

173 Edward W. Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 350 (1948). It is strange to give the defendant a windfall just because the plaintiff has made a correctable procedural error. *See supra* note 168. Indeed, in both cases discussed above, the trial

allowing a court to impose sanctions, including the opponents legal fees, on a party who files papers that are not reasonably based on the facts and the law.[174] Hence, if a plaintiff unreasonably wastes the time of the court and his opponent, Rule 11 vindicates their interests without muddling res judicata law or causing the plaintiff to forfeit a claim that may be worth many times the legal fees incurred in the initial action.

2. *Judgments Intended Not to Preclude*

Finally, the *Second Restatement* suggests two instances in which preclusion may be proper despite the clear intent of the rendering court or the parties to prevent preclusion: dismissals that are explicitly without prejudice, and agreements to split claims. Viewed in isolation, each instance could represent merely a poorly drafted attempt to articulate a clear and narrow exception to a limitation. Taken as a whole, however, they amount to far more than that. First, there is nothing narrow about the language, as they are both phrased in extremely broad terms. While a narrowing construction is possible, it would involve a tortured and unlikely reading of the *Second Restatement*. Most importantly, a broad reading of these phrases is consistent with the overall theme of the *Second Restatement* towards allowing courts the discretion to invoke preclusion unforeseeably.

a. *Dismissals That Are "Without Prejudice"*

The first such doctrine implies that a court could invoke preclusion in a second suit even though the prior suit was dismissed "without prejudice."[175] This statement may apply when a rule of the

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courts had found that the plaintiffs should prevail on the merits, and thus the preclusion did, in fact, give defendants a windfall.

174 Rule 11 states, in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name . . . . The signature of an attorney or party constitutes a certificate by the signer . . . that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

FED. R. CIV. P. 11.

In fairness to the drafters of *Tentative Draft No. 1* of the *Second Restatement*, the present text of Rule 11 was not enacted until 1983, ten years after their work. The text in effect in 1973 was very weak, and it is recognized to have "not been effective in deterring abuses." FED. R. CIV. P. 11 advisory committee's note (1983). *See infra* notes 212-13 and accompanying text.

175 Section 26 comment b states tbat "[a] determination by the court that its judgment is 'without prejudice' . . . to a second action on the omitted part of the claim . . . ,

court may automatically cause a voluntary dismissal to preclude further litigation on the claim, regardless of how the dismissal was labelled. This occurs most notably under the "two-dismissal rule," which states that once a plaintiff has voluntarily dismissed the same claim twice, his claim is precluded.[176] However, since this narrow exception is dealt with elsewhere in the *Second Restatement*,[177] it seems clear that the drafters intended to give courts broader discretion.[178]

An example of a court that improperly recast a dismissal without prejudice as one with prejudice is found in *Belliston v. Texaco*.[179] The plaintiff had *won* the original suit in federal district court where he claimed damages for breach of federal antitrust and commercial laws but did not assert identical claims under state law. On appeal, the Tenth Circuit reversed, finding in a technical opinion that the

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unless reversed or set aside, should *ordinarily* be given effect in the second action." RESTATEMENT (SECOND) OF JUDGMENTS § 26 cmt. b (emphasis added).

176 *See* FED. R. CIV. P. 41(a).

177 The reporter's note states:

> the second action should be held maintainable even though the court in the first action was wrong in making the express reservation [that the dismissal was without prejudice]. However, the effectiveness of a reservation may *conceivably* be impaired by statutes or rules regarding dismissals of actions, which should be consulted. Compare Comment h to § 20.

RESTATEMENT (SECOND) OF JUDGMENTS § 26 cmt. b, reporter's note (emphasis added). Section 20 comment h, in turn, indicates:

> [T]he specification that a dismissal is without prejudice must not be inconsistent with a governing statute or rule in the jurisdiction. For example, . . . in many jurisdictions, a voluntary dismissal operates as a bar to another action on the same claim when filed by a plaintiff who has once dismissed in any court of the United States or any state an action based on or including that claim. In such circumstances, a notation in the record that a nonsuit or dismissal is "without prejudice" . . . is not effective because the judgment operates as a bar as a matter of law.

This is the only explanation that the *Second Restatement* offers for precluding litigants in spite of clear principles of res judicata.

This explanation is eminently reasonable, particularly because courts often enter voluntary dismissals before the defendant is even aware of the suit. In such cases the defendant has no opportunity to argue that the dismissal should have been with prejudice. Indeed, if plaintiffs could successfully trick judges in this manner, judge-shopping would proliferate, with plaintiffs going from jurisdiction to jurisdiction, filing voluntary dismissals without notifying defendants until they received a favorable judge.

178 The notion that the vague invitation to preclude based on dismissals without prejudice refers only to the two-dismissal rule is difficult to defend. In light of repeated invitations to courts to ignore the rules of res judicata and develop novel exceptions to limitations, this provision can be sensibly read as another such invitation and could provide authority for a judge who seeks to justify second-guessing a dismissal without prejudice. It also encourages wasteful attempts to exploit this uncertainty in the rules. It would have been far better to state originally that, "A determination by the court that its judgment is without prejudice to a second action on the claim should be given effect in the second action unless it is contrary to an express rule of the jurisdiction."

179 455 F.2d 175 (10th Cir. 1972) (*Belliston I*); 521 P.2d 379 (Utah 1974) (*Belliston II*).

actions in question did not constitute interstate commerce and that the dispute therefore was a local matter beyond the reach of the federal statute.[180]

At this point, the plaintiff should have lost both his federal and his state claims. Under *Bell v. Hood*,[181] if a federal claim that is not "wholly insubstantial and frivolous"[182] is brought but is later found to be outside the ambit of federal law, the court can still exercise pendent jurisdiction over a related state claim. Since *Bell* explicitly states that "failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction,"[183] and since it is well-established that a federal suit will preclude pendent state claims if the plaintiff never seeks to join pendent claims,[184] claim preclusion would ordinarily have barred both claims.

However, for reasons that do not appear on the record, the Tenth Circuit decided not to preclude the plaintiffs claim. Choosing instead to ignore *Bell* (which is never mentioned in the opinion) and dismiss the suit for lack of jurisdiction,[185] the court allowed the plaintiff to refile the state claim in Utah state court. This determination is so plainly at odds with the explicit terms of *Bell* that it seems clear that, in actuality, the court was really exercising its discretion under Rule 41(b)[186] to specify that the dismissal for failure to state a claim was without prejudice.[187]

When the state court suit was brought,[188] the Supreme Court of Utah apparently did not appreciate being the tool of the Tenth Circuit's largesse. It therefore re-examined the facts of the case, and

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180 *Belliston I*, 455 F.2d at 177-81.

181 327 U.S. 678 (1946).

182 *Id.* at 682-83.

183 *Id.* at 682.

184 RESTATEMENT (SECOND) OF JUDGMENTS § 25 cmt. e, reporter's note; WRIGHT, MILLER & COOPER, *supra* note 1, § 4412, at 96. The situation is quite different if pendent jurisdiction is sought and is denied by the trial court. *See supra* note 154 and accompanying text.

185 *Belliston I*, 455 F.2d at 181.

186 FED. R. CIV. P. 41(b).

187 This is a classic example of a court's use of flexibility to avoid preclusion due to special circumstances. Had the Tenth Circuit's action been allowed to stand, injustice to the plaintiff would bave been avoided, while the precedent would have been sufficiently unusual that no sane litigant would ignore the rules of efficiency and count on a similar ruling. Wright, Miller and Cooper recognize the importance of this flexibility, stating that "[i]t is possible that a court may allow dismissal without prejudice . . . even after a plaintiff has failed at a trial on the merits, in light of a persuasive showing that the failure was excusable and that the plaintiff deserves a second opportunity." WRIGHT, MILLER & COOPER, *supra* note 1, § 4435, at 331.

188 *Belliston II*, 521 P.2d 379 (Utah 1974).

concluded that the dismissal was properly with prejudice because of the plaintiff's failure to raise the state claim in the federal suit.[189]

The state court opinion lost sight of two fundamental principles. First and foremost, the opinion ignored the principle that a court must have the power to dismiss suits without prejudice.[190] In this case, the Supreme Court of Utah thwarted the clear will of the Tenth Circuit, and thereby infringed on the latter's jurisdiction to dispose of its cases as it sees fit. By ignoring the clear specification that the prior dismissal was not on the merits, the Utah court also ignored the fact that the specification of the dismissal as "without prejudice" was itself res judicata.[191] While the action of the Utah Supreme Court cannot fairly be called a trap for the unwary (since the plaintiffs did not venture in of their own free will but rather were placed there by circumstance), it is certainly unprincipled.

More importantly, the state court's decision sacrificing foreseeability to promote flexibility in this case was pointless.[192] The Tenth Circuit's action was sufficiently remarkable that no class of future litigants would be able to take advantage of similar rulings; thus, the decision of the state court promoted neither efficiency nor clarity in the law. The federal trial and appeal make clear that Texaco never had legitimate grounds for reliance or repose, and also that judg-

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189 The state court's action rested on the theory that the plaintiff could have avoided the entire problem had he approached his federal suit more cautiously. First, pendent jurisdiction was clearly appropriate and would have prevented the entire problem. *Id.* at 381-82. Second, plaintiff could have withstood the dismissal for lack of jurisdiction simply by pleading diversity jurisdiction but failed to do so. *Id.* at 380 & n.4. Thus, the state court concluded that since the plaintiff failed to take advantage of an opportunity to include his claims under either diversity or pendent jurisdiction, claim preclusion properly barred his claim. *Id.* at 382.

Were it not for the sympathy of the Tenth Circuit, the state court would have been right—the plaintiff's inefficient behavior would have justly been penalized by claim preclusion. Once the Tenth Circuit made its lenient ruling, however, the situation was entirely different.

190 Despite the general rule that a court cannot dictate preclusion consequences at the time of deciding a first action, it should have power to narrow the ordinary rules of preclusion. A judgment that expressly leaves open the opportunity to bring a second action on specified parts of the claim . . . should be effective to forestall preclusion.

WRIGHT, MILLER & COOPER, *supra* note 1, § 4412, at 106.

191 Under principles of the conflicts of laws and full faith and credit, the Utah court could have applied preclusion only if the Tenth Circuit would have done so. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 87 (1980); Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 773 (1976). *See also* Halvey v. Halvey, 330 U.S. 610, 615 (1947) (A court in another jurisdiction has "as much leeway to disregard the judgment . . . as does the State where it was rendered."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 94-95 (1969) (stating that when a litigant seeks to use the judgment of one state to preclude in another, the res judicata law of the rendering state controls).

192 Indeed, the state court's dismissal works *against* flexibility, because it effectively reversed the decision of the Tenth Circuit to use its discretion to give the plaintiff a second chance because of the unusual circumstances of the case.

ment probably went to the party who would have lost on the merits. The only thing that the Supreme Court of Utah accomplished was the removal of one case from the docket of its court system. Given the prior litigation on identical issues, this case was a prime candidate for settlement anyway.

b. *Agreements to Split Claims*

The final example of the *Second Restatement*'s suggestions that courts develop unforeseeable exceptions to clear limitations is the implication that claim preclusion could apply despite an express agreement between the parties to split the claim.[193] Refusing to enforce such an agreement makes perfect sense if it is based on standard equitable doctrines, such as fraud, duress, or unconscionability.[194] However, the *Second Restatement*'s broadly phrased license to disregard these agreements was not likely intended to carry such a narrow meaning. If the drafters intended merely to leave room for such general equitable principles, they would have stated them clearly and explicitly, as they do in other areas where courts are given discretion to invoke equitable doctrines.[195] Rather, the *Second Restatement*'s pattern of flexible exceptions to limitations clearly indicates that the inclusion of this provision is another invitation to unforeseeable preclusion—in this case, a doctrine that would allow courts to void claim-splitting agreements as contrary to the policies of res judicata.

On the surface, the suggestion that res judicata could be imposed unilaterally by the court seems odd, because res judicata has always been an affirmative defense which, if not raised by party, is waived.[196] Res judicata, however, does contain important efficiency

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193 Section 26 comment h of the *Second Restatement* states:

> The parties to a pending action may agree that some part of the claim shall be withdrawn from the action with the understanding that the plaintiff shall not be precluded from subsequently maintaining an action based upon it. The agreement will *normally* be given effect. (emphasis added).

194 These doctrines would apply regardless of whether a settlement is viewed as a contract, WRIGHT, MILLER & COOPER, § 4443, at 383, or as a judgment, 1B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 0.409[5]. If the settlement is a contract, the *Restatement of Contracts* would automatically apply and the agreement would be void. If it is a judgment (in which case the splitting of the claim would come down via issue preclusion), rules voiding fraudulently procured judgments or consent decrees that are contrary to public policy would block preclusion. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28 cmt. j (blocking preclusion that results from concealment or mental or physical disability); MOORE ET AL., *supra*, ¶ 0.409[5], at 330.

195 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 20 cmt. n (allowing for the doctrines of estoppel or laches); *id.* § 26 cmt. j (allowing for waiver of claim preclusion that results from "mistake or fraud, concealment, or misrepresentation by the defendant").

196 *See* FED. R. CIV. P. 8(c) (requiring a defendant to "set forth affirmatively . . . res judicata.").

benefits for the judicial system as well as for the litigants.[197] These benefits to the courts may explain judges' eagerness to impose res judicata of their own accord.[198]

Nevertheless, the invalidation of claim-splitting agreements represents a "short-sighted insistence on 'efficient' litigation."[199] First, even if claim preclusion is inapplicable, issue preclusion can still ensure "efficient" litigation by blocking relitigation of any matters that overlap between the two actions. Second, a doctrine that voids claim-splitting agreements unfairly penalizes the plaintiff and gives the defendant a windfall when both parties appear equally culpable. Third, this doctrine could chill parties from splitting claims when such a split actually would be more just or more efficient.[200] In short, while the policy of judicial efficiency is important, judges must not forget Professor Cleary's warning of long ago: "[I]f the courts are too busy to decide cases fairly and on the merits, something is wrong."[201]

A court has yet to expressly invalidate an agreement to split a claim. At least one court, however, has taken the similar step of applying issue preclusion against the clear intent of the parties in the first action. In *Aetna Casualty and Surety v. Jeppesen and Co.*,[202] the parties settled during a bifurcated trial after the defendant had been found liable, but before the trial on damages.[203] This settlement declared the verdict stricken as if a new trial were granted.[204] Nevertheless, for purposes of judicial economy, the court allowed third

197 *See* Priest, *supra* note 52, at 535-36 (allocation of resources); Posner, *supra* note 30, at 998. In addition, preclusion sometimes benefits the judicial system by avoiding the possibility of inconsistent judgments. *See* WRIGHT, MILLER & COOPER, *supra* note 1, § 4403, at 12-13. *But see supra* note 46 (arguing that preclusion can also cause embarassing inconsistencies).

198 These benefits may have motivated courts which, contrary to the express words of Rule 8(c), apply res judicata *sua sponte*, or allow it to be pled for the first time on appeal. *See* WRIGHT, MILLER & COOPER, *supra* note 1, § 4405, nn.3-4 (collecting cases). *Sua sponte* invocation of res judicata gives it status that is usually reserved solely for issues of subject matter jurisdiction. *See* FED. R. CIV. P. 12(h)(3). However, it is virtually inconceivable that res judicata is properly elevated to that status, which would allow, inter alia, collateral attacks on res judicata grounds.

199 WRIGHT, MILLER & COOPER, *supra* note 1, § 4415, at 124.

200 For instance, when a suit seeks both an immediate injunction and damages, parties frequently agree to separate the claims so that the issues raised by the injunction may be ruled upon as rapidly as possible. This occurred in United States v. Munsingwear, 340 U.S. 36 (1950), discussed *infra* note 208. Similarly, parties who have a series of disputes arising out of similar circumstances may conduct a trial on one incident and use the result as the basis for settlement negotiations.

201 Cleary, *supra* note 173, at 348.

202 440 F. Supp. 394 (D. Nev. 1977).

203 *Id.* at 398.

204 *Id.*

parties to use the result as the basis for nonmutual issue preclusion against the defendant.[205]

Aetna Casualty is extremely short-sighted for two reasons. First, the settlement prevented the defendant from appealing the decision on liability, thus rendering that verdict unfit for issue preclusion.[206] Second, by casting doubt on the validity of such agreements, the court ensured that future litigants will be far more likely to try the damages issues and then appeal, rather than settle with a provision that the prior verdict be withdrawn. This is particularly true, as this case shows, in an era when offensive, nonmutual issue preclusion is allowed and can turn the loss of an insignificant case into a catastrophe.

C. What Motivated the Drafters of the *Second Restatement* to Allow Unforeseeable Preclusion

Why did the drafters of the *Second Restatement* disapprove of issue preclusion when the importance of the issue was unforeseeable, and yet deliberately leave open the possibility of equally unforeseeable preclusion that results from novel exceptions to established limitations? The arguments against unforeseeable preclusion could not have been unknown to them, because the vast majority of cases and articles cited in this Note were published prior to the final approval of the *Second Restatement* in 1980.[207] In fact, on two occasions the *Second Restatement* explicitly warus against unforeseeable preclusion.[208] It seems inconceivable that such a fundamental error could have been made by such a distinguished group.

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205 *Id.* at 405.

206 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28(1). For a discussion of the role of the right to appeal in such cases, see Comment, *Res Judicata and the Bifurcated Negligence Trial*, 16 UCLA L. REV. 203 (1968).

207 Indeed, two of the authors of *Wright, Miller, & Cooper*, served as Advisers to the Reporters of the *Second Restatement*. *See* WRIGHT, MILLER & COOPER, *supra* note 1, § 4401, at 6 & n.10.

208 The Reporter's Note to § 28(4) (dealing with a change in a hurden of proof) specifically disapproves of Harding v. Carr, 83 A.2d 79 (R.I. 1951), which states that a shift in the burden of proof from the plaintiff to the defendant (as opposed to an increase in the level of proof from preponderance to clear and convincing) is irrelevant to the application of issue preclusion. The decision to single out *Harding* for criticism is odd given the statement in the comment to that section that "there may be many occasions" that such changes should be disregarded. Indeed, a shift in the burden of proof is a less drastic difference than a change in the level of proof. *See supra* part III.A.2.

The *Second Restatement* is more emphatic in warning about a trap involving cases that have become moot. It is a well-established precept of res judicata law that issue preclusion should not apply when "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action." RESTATEMENT (SECOND) OF JUDGMENTS § 28(1). By its terms, this statement should apply to cases in which an appeal is prevented because the underlying controversy has become moot. However, in comment a to § 28, the following statement appears:

The likely answer lies in the explanation given by Reporter Benjamin Kaplan for replacing the *First Restatement* with a second: "[T]he rules of res judicata are intimately connected with the style of the procedural system. Therefore, when you pass from the older mode of procedure to the Federal Rules system of procedure, there must be compensating and corresponding changes in the law of res judicata."[209] While this statement seems to explain the drafters' actions, it also provides insight into why the *Second Restatement* is presently flawed. Since 1980, the Federal Rules of Civil Procedure have changed in two key ways that undermine the assumptions of the drafters of the *Second Restatement* and defeat their intentions.

The central concern of the drafters of the *Second Restatement* in allowing unforeseeable preclusion is revealed in the deleted portion of *Tentative Draft No. 1*: flexibility was allowed because "[i]n some instances, it would he plainly unfair to subject the defendant to a second action on the same claim because [the plaintiff could have] avoid[ed] the burden of additional litigation."[210] There are three tools at a judge's disposal to ameliorate this unfairness. First, he can preclude. Second, if the plaintiff caused the prior suit to end on an avoidable procedural problem that prevented a decision on the merits, the court can sanction the plaintiff under Rule 11[211] and thereby compensate the defendant for his attorney's fees. Third, if the second suit is so outlandish that no rational jury could find for the plaintiff, he can grant summary judgment for the defendant without going through a wasteful second trial. These latter two remedies provide the judge with adequate tools to ensure both that the defendant is not forced to bear the cost of two trials, and to ensure that the plaintiff cannot impose multiple costs on the court with impunity. Novel preclusion doctrines are simply unnecessary.

> Note: With respect to controversies that have become moot, it is a procedural requirement in some jurisdictions, in order to avoid the impact of issue preclusion, that the appellate court reverse or vacate the judgment below and remand with directions to dismiss.

Id. § 28 cmt. a.

This warning was necessitated by the decision of the Supreme Court in United States v. Munsingwear, 340 U.S. 36 (1950), in which the court adopted the above-mentioned doctrine. There is no apparent purpose for the doctrine. First, it is patently unfair to apply preclusion when there is no possibility of appellate review. Second, the doctrine only requires that litigants take the mechanical step of requesting that the case be remanded with instructions to vacate the prior judgment.

209 50 A.L.I. PROC. 260 (1974). *See also* RESTATEMENT (SECOND) OF JUDGMENTS, introductory note, at 5-10 (discussing the relationship between procedure and preclusion).

210 RESTATEMENT (SECOND) OF JUDGMENTS § 48.1 cmt. n (Tentative Draft No. 1, 1973).

211 FED. R. CIV. P. 11. The pertinent portion of the text is reproduced *supra* at note 174.

However, when the *Second Restatement* was adopted in 1980, the situation was quite different. At that time, Rule 11 applied only when the claim was brought in bad faith, and the Advisory Committee frankly admitted that "in practice [it] has not been effective in deterring abuses."[212] This problem was corrected by the controversial 1983 amendment to the rule.[213] Similarly, prior to 1986, a plaintiff could escape summary judgment by showing a "scintilla" of evidence that supported his claim.[214] Thus, preclusion was the only way to avoid wasteful trial expenses, and since "[j]udges, overwhelmed by docket loads, are looking for devices to expedite their work,"[215] tremendous pressure was placed on preclusion doctrine. A 1986 trilogy of cases on summary judgment, however, rejected the "scintilla" standard. These cases imposed a far easier test under which the trial judge need only decide that no reasonable jury could find for the defendant at trial, thereby making summary judgments much more available.[216]

Therefore, the primary motivation for the drafters of these rules no longer exists in federal court. These doctrines remain wrong and unprincipled in jurisdictions that have not adopted these reforms, and are all the more so given the additional tools judges now have to avoid unjust burdens on defendants.

CONCLUSION

This Note does not argue against future expensions of res judicata. Indeed, several of the doctrines criticized above could be effectively incorporated into the standard law of res judicata, so long as they are applied consistently and with due notice to the litigants.[217] Similarly, this Note does not contend that courts have

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212 FED. R. CIV. P. 11 advisory committee's note.

213 97 F.R.D. 165, 167 (1983).

214 *See* Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988) (collecting cases).

215 Alan Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Court*, 66 MICH. L. REV. 1723, 1724 (1968).

216 Celotex v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 547 (1986). One commentator argues that these cases went so far as to make summary judgment motions inquiries into the facts. *See* Stempel, *supra* note 214, at 163. The language of these decisions, however, make quite clear that "[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment." *Anderson*, 477 U.S. at 255.

217 For example, a rule requiring amendment of a complaint to include new claims as they accrue, *see supra* notes 162-66 and accompanying text, has some merit if it is clearly stated and foreseeably applied. Similarly, it might be useful to develop prospectively (perhaps as a Federal Rules Amendment), some form of nonmutual claim preclu-

abused res judicata to give judgment to an undeserving party for no apparent purpose. In each one of the cases outlined above, the court had a good reason for ruling as it did. Either it sought to introduce new efficiency into the law, or it sought to eliminate a case from its docket because it already "knew" how the case should come out, but could not grant summary judgment on the merits.

Rather, the problem is that these courts and the *Second Restatement* ignore the fundamental need for res judicata to be foreseeable, and therefore underinclusive. While justice requires flexible exceptions to ensure that res judicata is not overinclusive, it is impossible to design a system of res judicata in which preclusion is both fully inclusive and foreseeable. This tension means that judges must either endure a few trials they would rather avoid or adopt an unpredictable system of flexible preclusion. Doctrines that result in unforeseeable preclusion deprive litigants, who must be presumed to have a compelling case, of an opportunity to be heard and cause wasteful over litigation both of tangential matters and of preclusion itself. At the same time, by definition, unforeseeable preclusion cannot influence litigants to bring suits in efficient "packages" or to have the confidence that creates reliance and repose. These benefits derive from the expectation of preclusion, and expectation of unforeseeable preclusion is an oxymoron.

Indeed, unforeseeable preclusion serves only one purpose: to spare one particular litigant the expense and aggravation of a trial. What the Supreme Court said almost 75 years ago regarding the need to avoid undue flexibility in blocking preclusion is equally applicable to undue flexibility in invoking it: "[W]e can not be expected, for [one litigant's] sole relief, to upset the general and well-established doctrine of res judicata. . . . [T]he mischief which would follow the establishment of precedent for so disregarding [the rules of res judicata] would be greater than the benefit of relieving some case of individual hardship."[218]

Robert Ziff †

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sion to prevent litigants from avoiding nonmutual issue preclusion by suing different targets under theories that have different standards of proof.

218 Reed v. Allen, 286 U.S. 191, 198-99 (1932).

† The author would like to thank Professors Kevin Clermont and Robert Kent for their invaluable help, and Rusty Wilson for his relentless persistence in ferreting out key mistaken assumptions in earlier drafts.